HISTORY

OF THE

COURT of CHANCERY

BY

A. H. MARSH, Q.C.

ARMOUR (E. D.) ON TITLES. A Treatise on the Investigation of Titles to Estates in Fee Simple, with a Precedent for an Abstract, being the Third edition of Mr. Taylor's Work, 1888. Half-calf, $5.00

BARRON ON BILLS OF SALE AND CHATTEL MORTGAGES. Second edition. Enlarged and Improved, 1888. Cloth, $7.00; Half-calf, $7.50.

BOYS ON CORONERS. A Practical Treatise on the Office and Duties of Coroners. By W

BURKE'S
tion P
at Osg
set of Examina-
erally submitted

CAMERO
and c.
RIO, with notes

CAMERO
cases
$1.50.
ding opinions on
$1.00; Half-calf

CAMERO
most
ıe Canadian and
Half-calf, $7.50.

CANADI
of Re
Q.C.,
ual for the use
O. Ermatinger,

CANADI
in the
Edwa
Corres
begin
of Cases decided
a Scotia, Prince
cases, Reviews,
ımum in advance

CANADI
tion fo
useful informa-

CASSELS
since
cases. Half-calf, $10.00.
ourt of Canada,
200 unreported

CASSELS' (R., Q.C.) MANUAL OF PROCEDURE in the Supreme Court of Canada, a new edition in press, revised to date, 1888.

CARSWELL & CO., LAW PUBLISHERS, Etc.,

26 & 28 Adelaide Street East, Toronto.

CLARKE ON BILLS. A Treatise on the Law relating to Bills, Notes, Cheques and I.O.U.'s as it exists in each of the Provinces. By S. R. Clarke. Half-calf, $2.00.

CLARKE'S (S.R.) CRIMINAL LAW OF CANADA. Second Edition. By S. R. Clarke and H. P. Sheppard. Half-calf, $6.00.

CLARKE'S (S. R.) INSURANCE. A Treatise on the Law of Insurance in Canada, and giving every case on Fire, Marine and Life up to date of publication. 1877. Half-calf, $2.00.

CLARKE'S (S. R.) MAGISTRATES' MANUAL. Second Edition. The cases since last edition take up more than 200 pages of the present work including Digest of Cases on Scott Act, 1888. Half-calf, $5.00.

DOUTRE'S CONSTITUTION OF CANADA. The B.N.A. Act, 1867: its Interpretation gathered from the Decisions of the Courts; the dicta of Judges, etc. By Jos. Doutre, Q.C. Half-calf, $5.00.

DOUTRE ET LAREAU DROIT CIVIL CANADIEN. Suivant l'ordre etabli par les Codes. Precedè d'une Historic generale du droit Canadien. Vol. I. (all published), 1492-1791. Half-sheep, $2.25.

EWART'S EXAMINATION QUESTIONS on Leith's Blackstone. By J. S. Ewart, Q.C. Paper, $1.

EWART'S INDEX TO THE STATUTES OF CANADA, since Consolidation (1859) up to and including 1878; also of Ontario to 1877: and Quebec, 1866 to 1876. By J. S. Ewart. Half-calf, $2.50.

EWART'S (J. S., Q.C.) MANUAL OF COSTS in Supreme Court of Canada, and Courts of Appeal, County Court, Division Court, etc. of Ontario; with Forms of Bills of Costs under Ontario Judicature Act. 1888. Cloth, $2.50; Half-calf, $3.00.

FORAN'S CODE OF CIVIL PROCEDURE of Lower Canada, with amendments thereto; Statutes relating to Procedure; Rules of Practice; Digest of Decisions, arranged under appropriate articles. Second edition. By T. P. Foran, M.A., B.C.L. 1885. Half-calf, $7.00.

FORAN ON OBLIGATIONS. 1887. Cloth, $1.50.

GRANT'S SCOTTISH ANECDOTES AND TALES. Paper, 25c.; Cloth, 40c. "A capital collection, illustrative of national character, and sure to be appreciated." "An excellent companion for a leisure hour."

CARSWELL & CO., LAW PUBLISHERS, Etc.,

26 & 28 Adelaide Street East. Toronto.

HANNAY'S NEW BRUNSWICK REPORTS. 2 vols., (being N.B.R. vols. 12 and 13.) Half-calf, each $7 50.

HARDY'S LEGAL DIRECTORY 1883. Cloth, 50c.

HODGINS' ELECTION REPORTS of the Decisions for the Trial of Election Petitions in Ontario, relating to Elections to the Legislative Assembly, 1871 to 1879, and to the House of Commons of Canada, 1874 to 1878. By Thos. Hodgins, Q.C. Half-calf, $6.

HODGINS (W. E., M.A.) ON JOINT STOCK COMPANIES, being Synopsis of the Provisions of the Companies Act, Revised Statutes of Canada, chapter 119, and 50-51 Victoria, chap. 20, with Forms, etc. 1888. Cloth, $3.00.

HODGINS' (THOS., Q.C.) VOTERS' LIST for Legislative and Municipal Elections in Ontario, with Forms, etc. 1886. Cloth, $3.00.

HOWELL ON NATURALIZATION AND NATIONALITY IN CANADA: Expatriation and Repatriation of British subjects; Aliens, their disabilities and privileges in Canada, etc. By Alfred Howell, Cloth, $1.50; Half-calf, $2.

HOWELL'S SURROGATE COURT PRACTICE. A Treatise on the Law and Practice as to Probate, Administration and Guardianship, in the Surrogate Courts, in common form and contentious business, including all the Statutes, Rules, Orders and Forms. By Alfred Howell. Half-calf, $6.

JAMES' NOVA SCOTIA REPORTS. Half-calf, $6.

JONES' CONSTABLE'S GUIDE. The County Constable's Manual or Handy-Book, with subjects arranged alphabetically. By J. T. Jones, High Constable County York. Cloth, 50c.; Leather, 75c.

JONES ON PRESCRIPTION AND EASEMENTS. A practical Treatise on Real Property Limitation, with a complete Compendium of the Law of Easements. By H. C. Jones, M.A. Half-calf, $5.

JONES ON THE TORRENS SYSTEM of Land Transfer. A Practical Treatise on "The Land Titles Act of 1885, Ontario," and "The Real Property Act of 1885," Manitoba. Embracing all the English, Australian and Canadian Cases. By H. C. Jones, M.A. Cloth, $4.50; Half-calf, $5.

CARSWELL & CO., LAW PUBLISHERS, Etc.,

26 & 28 Adelaide Street East, Toronto.

HISTORY

OF THE

COURT OF CHANCERY

AND OF THE

RISE AND DEVELOPMENT

OF THE

DOCTRINES OF EQUITY.

By A. H. MARSH,

One of Her Majesty's Counsel.

TORONTO:
CARSWELL & CO., PUBLISHERS.
1890.

PRINTED BY
THOS. MOORE & CO., LAW PRINTERS
22 & 24 ADELAIDE ST. EAST
TORONTO.

TO

THE HONORABLE WILLIAM PROUDFOOT,

Late Vice-Chancellor of the Court of Chancery of Ontario,

AND

Late Justice of the Supreme Court of Judicature for Ontario,

This Little Book is Dedicated

IN

Remembrance of the many kind words of suggestion, counsel, and encouragement extended by him to the author, and as a slight token of esteem for the ripe scholarship, the unvarying courtesy, and the conscientious life-work of one who may here be fittingly referred to as one of the last of the Chancery Judges.

PREFACE.

WHEN the Law School in connection with the Law Society of Upper Canada was re-established upon a new basis the writer was appointed Equity Lecturer to the school, and his duties as such lecturer made it necessary for him to sketch the early history of the Court of Chancery, for the purpose of explaining to the class the origin and development of the equitable jurisdiction of that Court. This little book contains the historical and introductory lectures delivered for that purpose. Free use has been made of Mr. Spence's admirable work upon the "Equitable Jurisdiction of the Court of Chancery," which contains a mine of information for the student; and yet is scarcely fitted for class room work. An endeavour was made to make the lectures interesting as well as instructive, and this accounts for some of the peculiarities observable in the book. The writer has ventured to think that perhaps some persons outside of his class might desire to refresh their memories relating to the matters herein touched upon, hence this publication.

A. H. M.

July, 1890.

TABLE OF CONTENTS.

THE

RISE AND DEVELOPMENT

OF THE

DOCTRINES OF EQUITY.

What is Equity?

The best answer to this question is to be found in the history of the origin and establishment of the Court of Chancery, and of the rise and development of the equity jurisdiction and the practice of that Court.

From this history we shall learn the circumstances which gave rise to the organization of that Court; the evils which were intended to be remedied thereby; the methods adopted to afford those remedies; the jealous opposition of the Common Law lawyers; the struggle for jurisdiction which took place between the Courts of Equity and the Courts of Common Law, and the triumph

of the Court of Chancery, followed by the ultimate prevalence of Equity?

King Administered Justice in Person:

During the Norman Period the Kings of England as the "fountain of justice," occasionally at least, administered justice in person and sat as a court of justice, or as a constituent part of such court, for the purpose of administering the laws and redressing the wrongs of their subjects.

Madox doubts whether the *Anglo-Saxon Kings* ever sat in a judicial capacity, and he thinks that in Anglo-Saxon times justice was administered exclusively in courts within the several counties, Towns or Districts, and that the King's Court is an institution of the Norman Period.

1 Madox' History of the Exchequer 92.

As the courts and judges in course of time became comparatively independent of royal control, and as their jurisdiction became more fully mapped out and recognized, it was held that although the King is entitled to sit in his courts with the judges, yet he is not entitled to take any part in the administration of justice; and when James the First sat personally in court, and desired to take part in the administration of justice, he was told that he was not entitled to "determine any cause

but by the mouth of his judges to whom he has committed the whole of his judicial authority."

4 Inst. 73; and See 1 Spence's Equitable Jurisdiction of the Court of Chancery 330.

An account of the controversy between King James and the judges, upon this point, is given by Coke in 12 Rep. 63, where it is stated that "It appears in our books that the King may sit in the Star Chamber; but this was to consult with the justices upon certain questions proposed to them, and not *in judicio;* so in the King's Bench he may sit, but the Court gives the judgment; and it is commonly said in our books, that the King is always present in Court in the judgment of law, and upon this he cannot be non suit; but the judgments are always given *per curiam;* and the judges are sworn to execute justice according to the law and custom of England. * * And the judges informed the King that no King after the Conquest assumed to himself to give any judgment in any cause whatsoever, which concerned the administration of justice within this realm, but these were solely determined in the Courts of Justice." Further on in the report Coke says:—"A controversy of land between parties was heard by the King, and sentence given,

which was repealed for this, that it did belong to the Common Law; then the King said that he thought the law was founded upon reason and that he and others had reason as well as the judges; to which it was answered by me that true it was that God had endowed his Majesty with excellent science and great endowments of nature, but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an act which requires long study and experience before a man can attain to the cognizance of it; and that the law was the gold metwand and measure to try the causes of the subjects, and which protected his Majesty in safety and peace; with which the King was greatly offended, and said that then he should be under the law, which was treason to affirm, as he said; to which I said that Bracton saith *quod Rex non debet esse sub homine, sed sub Deo et lege.*"

By 28 Ed. I., Stat. 3, cap. 5, it was enacted as follows:—"The King will that the Chancellor and the Justices of his Bench shall follow him, so that he may have at all times near unto him some sages of the law, which be able duly to order all

such matters as shall come unto the court at times when need shall require."

Madox shows that in early times the Kings of England did administer justice in person and says: "Let no man suppose it to be a novel usage for Kings to sit personally in judicature. On the contrary it is a very ancient one, and conformable to the law and practice of nations in many ages; of this it may suffice to produce here a few instances. Solomon, King of Israel, a wise and magnificent Prince, adjudged personally in the cause of the two women, one of whom had a living child and the other a dead one;" and Madox then cites numerous instances, both in ancient and mediaeval history, in which Kings were accustomed to administer justice in person.

I Madox' History of the Exchequer 88 *et seq.*

Sir William Dugdale in his *Origines Juridiciales* says:—"The King and no other ought to be judge, if he alone were able to perform that task, being thereunto obliged by the tenor of his oath; to him therefore it belongs to exercise the power of the law, as God's vice regent and officer on earth. But if the King cannot of himself determine every controversy, to the end his labour may be the less by dividing the trouble amongst

divers persons, he ought to choose men of wisdom, fearing God, and out of them to constitute judges."

Dugdale's *Origines Juridiciales* (3 Ed.) 19.

And further on the same author says:—"When by the multiplying of people inequity so increased as that contentions and differences did daily more and more abound, it was impossible that any one person should hear and determine all of their causes, or any one place be of capacity sufficient to receive all the suitors. Hence was it therefore that Jethro advised Moses whom God had set over the Israelites (the first people of the world unto whom any written laws were delivered) as their chief ruler, to commit the distribution of justice, under himself, unto several persons and in sundry places, as in the xviii. chapter of the Book of Exodus appeareth."

Ib. 22.

The Curia Regis:—

During the Norman period the Witenagemot of the Anglo-Saxons, in its feudalized form, was known as the *Curia Regis*, or the King's Court.

From as far back as we are able to trace the history of England we find that the Kings of England have governed that country with the aid and advice of select and trusty counsellors, chosen for

their wisdom in the various branches of government, in connection with the administration of which their advice was specially sought. These advisers of the King varied in number from time to time, but in a general way they were divided into various distinct bodies or councils, having separate and distinct functions, and being composed of those persons whose wisdom and experience best fitted them for service in the particular council to which they were called. The aggregate body of these councils was during the early portion of the Norman period known as the *Curia Regis*.

During the Norman period the *Curia Regis* in its broadest signification, included at least four distinct councils :—

(1) The Consilium Privatum.
(2) The Consilium Ordinarium.
(3) The Magnum Consilium.
(4) The Commune Consilium.

The *Consilium Privatum* (sometimes called the Select Council) consisted of certain select persons of the nobility and great officers of the State, specially called and sworn, with whom the King usually advised in matters of State and government. This Council exists in modern times under the name of the Privy Council.

The *Consilium Ordinarium* consisted of those persons who were thereunto called by the King, and these persons were usually so called, namely:

(1) Commonly and generally all those who were members of the Privy Council.

(2) The great officers and Ministers of State, as the Chancellor, Treasurer, Lord Steward, Lord Admiral, Lord Marshal, the Keeper of the Privy Seal, Chamberlains of the Household, Chancellor to the Exchequer and Duchy, which officers were likewise most commonly of the Privy Council.

(3) The Master of the Wardrobe, Treasurer and Comptroller of the Household and Chamberlains of the Exchequer.

(4) The Judges of both Benches, Barons of of the Exchequer, divers Masters of the Chancery, the King's Sergeant and Attorney General.

(5) Sometimes were added the Judges itinerant, Master of the Rolls and other men of prudence, ability and experience in business of importance.

Upon great and important occasions all the persons composing the Council were called together to advise the King, but when the business was of more contracted nature, and fell more specially under the cognizance of some of this Council, then

those were called to it that were the fittest to advise about it; as the Chancellor and judges when the advice concerned matters in law; the Treasurer of England and Chancellor of the Exchequer concerning the state of the revenue and the like.

The *Magnum Consilium* (which in modern times is known as the Lords' House in Parliament) was of two kinds, viz.: a *Magnum Consilium* out of Parliament, and a *Magnum Consilium* in Parliament. The Great Council had the Ordinary Council annexed to it as a council within a council, or a council attached to a council, and sometimes had also an annexation of many more to them.

The Great Council sometimes, though not often, met out of Parliament and enacted ordinances which were usually afterwards re-enacted in Parliament. Lord Chief Justice Hale says that the only great Council out of Parliament, which hath in his remembrance been called, was at York at the coming in of the Scots. When this Council sat in Parliament it consisted of the Lords spiritual and temporal, who usually sat in conjunction with the Ordinary Council before referred to.

The *Commune Consilium* consisted of both the Houses of Parliament, which, together with the King, says Lord Chief Justice Hale, is the

highest and greatest court in England and hath a plenitude of power, as well legislative as deliberative and executive, or power of jurisdiction in its full comprehension.

> Hale's The Lords' House in Parliament, pages 4 to 13, and see 1 Spence's Equitable Jurisdiction of the Court of Chancery, 328-9.

Madox gives this account of the mode of dispensing justice in the King's Court:—"We may consider the King as Sovereign or chief Lord of this Realm, and the fountain of justice to his subjects, residing in his royal palace and attended by his Barons and great officers, both of the clergy and laity; the liege-men of his kingdom bring their complaints or causes before him as supreme arbitrator and judge, to be determined in his court or palace, wherein was the seat of the supreme judicature. Their causes were heard and judged either before the King himself, or else (most usually) before his Chief Justicier, or before him together with some others who were styled *Justiciae* or Justiciers. When the King went beyond the sea (which frequently happened during the period of time we are now considering) he was wont to constitute some one or more great men to represent him in government and administration of justice. * * And

such Justicier in the King's absence had a power resembling the regal. For he presided both in government and administration of justice. Howbeit that power of his, in point of administration of justice, was sometimes in particular cases restrained or superseded, if the King thought fit. For the King, whilst he was beyond the Sea would sometimes interpose and either by his Writs *De ultra mare*, or in some other manner, direct what should be done in some causes, or suspend the judgment of his Justicier therein, till his next return into England, or till some other time which he thought meet to prescribe."

1 Madox' History of the Exchequer, 84.

"If the cause brought into the King's Court was of ordinary importance, 'tis probable that it was usually dispatched by the High Justicier or other Barons and Justiciers, who had leisure from the King's other business to attend upon it; but that if it was of great importance it was considered and judged in a fuller assembly. For as things of weight were, according to the usage of those times, generally done with solemnity; so it is likely that they were done with greater or lesser solemnity according as they were of greater or lesser weight."

1 Madox' History of the Exchequer, 88.

"It is to be understood that the King's Court was a sure asylum for the oppressed. In the greatness of this Court consisted the subject's security. And the more full and solemn this court was, the greater was the injured complainant's safety and assurance of relief. When the Sovereign, or his vice-regent the chief Justicier, sat in judicature then the King's Court was full and solemn; when they were absent it was more private and unsolemn. In their presence, especially the Sovereign's, no place was left for injustice or wrong. Their judgment was venerable and not to be suspected of partiality or error. So that it was not a light privilege to have one's cause determined in the presence of the King, the supreme judge, or the Chief Justicier who was next to the King in judicial power. That privilege was usually and most properly annexed to important causes. And if I observe right (says Madox) it was generally granted either to persons of high rank or to such as wanted effectual protection against some powerful oppressor."

1 Madox' History of the Exchequer, 120.

Office of Chancellor:

Blackstone says that:—"The office and name of Chancellor (however derived) was certainly known to the Courts of the Roman Emperors; where it originally seems to have signified a Chief

Scribe or Secretary, who was afterwards invested with several judicial powers and a general superintendency over the rest of the officers of the prince. From the Roman Empire it passed to the Romish Church, ever emulous of imperial state; and hence every bishop has to this day his chancellor, the principal judge of his consistory. And when the modern Kingdoms of Europe were established upon the ruins of the empire almost every state preserved its Chancellor, with different jurisdictions and dignities according to their different constitutions. But in all of them he seems to have had the supervision of all charters, letters and such other public instruments of the Crown as were authenticated in the most solemn manner; and therefore when seals came in use he had always the custody of the King's great seal. So that the office of the Chancellor or Lord Keeper (whose authority by Statute 5 Eliz., cap. 18, is declared to be exactly the same) is with us at this day created by the mere delivery of the King's great seal into his custody; whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the Kingdom."

3 Blk., Com. 46-7.

As early at least as the tenth year of Richard II. the Lord Chancellor was required to take an

oath, which in a very general way comprehended his functions, and which was in the following terms: "That he shall well and truly serve the King and his people in the office of Chancellor; that he shall do right to all people, poor and rich, after the law and usages of the realm; that he shall truly counsel the King and his counsel laine [*i.e.*, conceal] and keep; that he shall not know or suffer the hurt or disheriting of the King, or that the rights of the Crown be decreased by any means, so far as he may let it [*i.e.*, prevent it]; and if he may not let it, he shall make it clearly and expressly to be known to the King with his true advice and counsel; and that he shall do and purchase the King's profit in all he reasonably may."

4 Inst., 88.

In the course of time the Chancellor acting as delegate of the King came to exercise a very considerable portion of the royal prerogative authority pertaining to the administration of justice, and more especially that portion of the royal prerogative which warranted the King in ameliorating the rigor of the common law, in all cases in which natural justice, equity and good conscience required his intervention, and thus the Chancellor came to be called the keeper of the King's conscience. Hence it is that the Chancery has been termed

"the secret closett of his Majesty's conscience where his oppressed and distressed subjects hope to find mercy and mitigation against the rigour and extremitye of his lawes."

Hargrave's Law Tracts, 427.

Madox, referring to the Norman period, says: "The King's Chancellor was usually in those times a Bishop or other Prelate, or an ecclesiastical person. * * In truth in England the Chancellor was the King's chief Chaplain, and had the superior care both of the King's Chancery and of his Chapel."

1 Madox' History of the Exchequer, 60.

Origin of the Common Law Courts:

The judicial business coming before the *Curia Regis*, or a large portion of it, was divided between three permanent committees of that body, which afterwards became known as the Courts of Exchequer, Common Pleas and King's Bench, the Court of Exchequer assuming jurisdiction over matters connected with the revenue; the Court of Common Pleas assuming jurisdiction over all civil disputes, where neither the King's interest nor any matter savouring of a criminal nature was involved, and the Court of King's Bench retaining all the remaining business which had originally been heard

and determined before the three Committees of the *Curia Regis*.

See Hale's Lord's House in Parliament, 23, 51, 55.

Chancery as a Common Law Court:

The Chancellor as a member of the *Curia Regis*, and more particularly as a member of the King's Select or Permanent Council, acquired an ordinary or Common Law judicial jurisdiction before he acquired the extraordinary or equitable jurisdiction in which we are now more particularly interested in connection with this inquiry. This ordinary or Common Law jurisdiction, which Lord Chief Justice Hale speaks of as the legal or Latin side of the court, included amongst other things the power to repeal the King's letters patent, to hear petitions of right against the Crown, to hear all personal actions to which the King or his officers were parties, and to issue all original Writs by which all actions in the Common Law Courts were commenced.

1 Spence, 336-7; Hale's Lords' House in Parliament, 47;

3 Blk., Com. 47-8;

Bacon's Abr. Title "Court of Chancery" B.

Com. Dig. *Chancery*, C. I.

When we find it stated that the Court of Chancery is an original and fundamental court as ancient as the Kingdom itself we must remember that the reference is made to the Court of Chancery as a Common Law Court and not as a court exercising the equitable jurisdiction which is the leading feature of the Court of Chancery in more modern times.

Com. Dig.—*Chancery* A. 1, A. 2.

Original Writs:—

All actions, in the Common Law Courts referred to, had to be commenced by what was called an "Original Writ," which was a writ under the Great Seal, issued in the name of the King and directed to the sheriff of the proper county, stating the cause of the plaintiff's complaint and requiring the sheriff to command the defendant to satisfy the plaintiff's claim, or to appear in one of the Common Law Courts to answer for his default. These writs all issued out of the Court of Chancery (as a Common Law Court) and the framing of these writs was a part of the duty of the Chancellor's Clerks, who were afterwards called Masters in Chancery. The duties of these clerks were to hear and examine the complaints of those who sought

redress in the King's Courts and to furnish them with the appropriate writs.

1 Spence 238.

Professor Maitland has recently written a most interesting article upon the history of the Register of Original Writs, which begins as follows:—"*De Natura Brevium.* Of the Nature of Writs.—Such is the title of more than one well known text book of our mediæval law. Legal remedies, legal procedure, these are the all-important topics for the student. These being mastered, a knowledge of substantive law will come of itself. Not the nature of rights, but the nature of writs, must be his theme. The scheme of "Original Writs" is the very skeleton of the Corpus Juris. So thought our forefathers, and in the universe of our law books, perhaps in the universe of all books, a unique place may be claimed for the Registrum Brevium—the register of writs current in the English Chancery. It is a book that grew for three centuries and more. We must say that it grew; no other word will describe the process whereby the little book became a big book. In its final form when it gets into print it is an organic book; three centuries before it was an organic book. During these three centuries its size increased twenty-fold, perhaps fifty-fold; but

the new matter has not been just mechanically added to the old; it has been assimilated by the old; old and new became one."

3 Harvard Law Rev. 97.

This Register of Writs contains the forms of the Original Writs by which all actions in the Common Law Courts were commenced, and one of the most important functions of the early Chancery was the framing of these writs.

Madox gives the following account of the commencement of the use of these Original Writs:— "If the King, when he was present in the realm and sat in judgment did not determine all the causes that were brought before him, his Justicier (or Justiciers) determined the same. However, if the Justicier did not do right justice, the party might, as I take it, afterwards resort to the King himself. In this case of application to the King's Court we may suppose the party suing for relief did usually obtain it in this manner. He paid or undertook to pay the King a fine or fines to have *Justicium* or *Rectum* in his Court; and thereupon he obtained Writs or precepts by means whereof he pursued and recovered or settled his right. Those Writs or precepts were made out under the King's Seal. And for the making and issuing of them (and for other

services) the King used to have near his person or in his Court some great man (commonly a Bishop or Clergyman) who was called his Chancellor, and had the keeping of his Seal. The Chancellor had under him certain clerks, employed in making out those writs. Whence it came to pass in process of time that in law proceedings the King's Chancery was the spring or first mover, and the principal or original writs (for the introducing of causes) were called Writs of the Chancery."

1 Madox' History of the Exchequer 85-6.

Although all the Original Writs were framed and issued by the Chancery Clerks, yet the Common Law Courts assumed exclusive jurisdiction to decide upon their validity and they disregarded the sanction of the Chancellor and his College of Clerks. Moreover, the Chancellor had no power to declare what should be a sufficient defence to any of the actions so commenced.

1 Spence 325.

The natural tendency of lawyers to establish and follow precedents brought about the result that in the course of time special forms of Original Writ were established for all the ordinary causes of action and the Common Law judges refused to allow these forms to be in any way altered or modified, and

finally they refused to sanction any new forms of writ for the purpose of assisting any new or novel causes of action, and they refused to entertain any causes of action which were not covered by the known and approved forms of writ.

1 Spence 240.

Statute of Westminster the Second :—

This state of affairs led to legislative interference, and the Statute of Westminster the Second (13 Ed. 1 cap. 24) was passed, by which it was enacted that: "Whensoever from henceforth it shall fortune in Chancery that in one case a writ is found and in like case *(consimili casu)* falling under like law, and requiring like remedy, is found none, the clerks of the Chancery shall agree in making the writ, or adjourn the plaintiffs into the next Parliament; and let the cases be written in which they cannot agree, and let them refer themselves to the next Parliament, by consent of men learned in the law a writ shall be made, lest it might happen after that the Court should long time fail to minister justice unto complainants."

Failure of this Statute :—

Blackstone says that this provision with a little more accuracy in the clerks of the Chancery

and a little liberality in the Judges, by extending rather than narrowing the remedial effects of the Writ, might have effectually answered all the purposes of a Court of Equity, except that of obtaining discovery by the oath of a defendant.

3 Blk. Com. 51.

Mr. Spence says :—"This Statute opened the means of obtaining remedies in numerous cases, which were before excluded by the rules of the Common Law; and other Statutes were passed to supply many of the deficiencies in the Common Law as new circumstances, unprovided for by the law, arose. But in fact a *lex scripta* grew up in the interpretation of the apparently large and flexible provisions of the Statute of Westminster the Second itself. To supply the yet existing deficiencies in the law the remaining expedient presented by the Roman judicial system, namely, the exercise of the royal prerogative in particular cases, and on their own circumstances as they occurred, was resorted to."

1 Spence 325-6.

The Chancellor's Extraordinary Jurisdiction :—

Before dealing with the methods by which equitable relief was afforded to suitors, to supply the

defects of the Common Law system, it will be necessary for us to go backward in point of time and inquire into the origin of the Chancellor's extraordinary jurisdiction.

We have already pointed out that the Courts of Exchequer, Common Pleas and King's Bench, branched off from and sprang out of the *Curia Regis*, and that the Chancellor, as a constituent of the *Curia Regis*, exercised judicial functions as a court of Common Law, but it is necessary for us to remember that the *Curia Regis*, whether sitting as the King's Great Council or Parliament, or acting through the King's Select or Privy Council, still continued to exercise judicial functions with respect to suitors presenting their petitions for relief.

"In the time of Edward I., and for some time afterwards, the Parliaments, excepting as regards the granting of taxes, were not so much legislative assemblies, as the King's Great Council, in which subjects applied for judicial relief against their fellow subjects. In early times petitions of all kinds and descriptions were presented to the King, or to the Great Council on the occasion of their meeting. The Parliament or Great Council itself disposed of many of the cases brought before it; amongst the rest those which had been referred to it, from their difficulty by the ordinary tribunals.

If the case required a new law, an award was made by the King and Barons, who alone at this time * * * interfered in regard to matters connected with the administration of justice. This award in early times had the force of a statute; afterwards the Commons * * * * established the right of concurring in all legislative Acts, and by consequence, in these awards, which then became what are now called Private Acts of Parliament."

1 Spence 332.

As the King's Great Council or Parliament met only in obedience to special writs of summons, and as the King's Select Council, or what would now be called the Privy Council, was always sitting for the dispatch of business, and as this body was presided over by the King himself, or in his absence by the Chancellor or some other person delegated by the King, it was but natural that suitors should petition the King in Council for the special exercise of his royal prerogative, in regard to matters relating to the administration of justice, and it appears that the King in Council did exercise a prerogative jurisdiction in cases of fraud, deceit and dishonesty, not so tangible as to be within the reach of the Common Law, including matters both civil and criminal.

1 Spence 329, 330, 331.

Speaking of the coercive authority exercised by the Select Council of the King, Hallam says: —"It may be divided into acts legislative and judicial. As for the first, many ordinances were made in Council; sometimes upon request of the Commons in Parliament, who felt themselves better qualified to state a grievance than a remedy; sometimes without any pretence, unless the usage of government, in the infancy of our constitution, may be thought to afford one. These were always of a temporary or partial nature, and were considered as regulations not sufficiently important to demand a new statute. Thus in the second year of Richard II., the Council, after hearing read the statute roll of an Act recently passed, conferring a a criminal jurisdiction in certain cases upon Justices of the Peace, declared that the intention of the Parliament, though not clearly expressed therein, had been to extend that jurisdiction to certain other cases omitted, which accordingly they caused to be inserted in the commissions made to these Justices under the Great Seal. But they frequently so much exceeded what the growing spirit of public liberty would permit that it gave rise to complaint in Parliament. The Commons' petition in 13 R. II., that 'neither the Chancellor nor the King's Council, after the close of Parliament may

make any ordinance against the Common Law, or the ancient customs of the land, or the statutes made heretofore or to be made in this Parliament; but that the Common Law have its course for all the people, and no judgment be rendered without due legal process.' The King answers, 'Let it be done as has been usual heretofore, saving the prerogative; and if any one is aggrieved, let him show it specially and right shall be done him.' This unsatisfactory answer proves the arbitrary spirit in which Richard was determined to govern."

Hallam's Middle Ages, cap. VIII., part 3.

Again, in speaking of the ordinary functions of the Select or Privy Council of the King, Hallam says:—

"The business of this Council out of Parliament may be reduced to two heads: its deliberative office, as a council of advice, and its decisive power of jurisdiction. With respect to the first it obviously comprehended all subjects of political deliberation, which were usually referred to it by the King; this being in fact the administration or governing Council of State, the distinction of a Cabinet being introduced in comparatively modern times. But there were likewise a vast number of petitions continually presented to the Council, upon

which they proceeded no farther than to sort as it were and forward them by indorsement to the proper courts, or advise the suitor what remedy he had to seek. Thus, some petitions are answered, 'this cannot be done without a new law'; some were turned over to the regular Courts, as the Chancery or King's Bench; some of greater moment were indorsed to be heard 'before the great Council'; some concerning the King's interest were referred to the Chancery or select persons of the Council."

Hallam's Middle Ages, cap. VIII., part 3.

See Hale's Lord's House in Parliament, 26.

Not only was the Select Council in the habit of referring the petitions of suitors to the appropriate courts, when no extraordinary interference on the part of the Council appeared to be necessary, but the Great Council or Parliament was also accustomed to pursue a similar course.

Mr. Spence says:—"In cases not requiring special interference the same course seems to have been adopted as on the applications which were made to the Council. If the matter were remediable at law, and there were no obstacle to the remedy being obtained, the petitioner was sent to the Common Law Courts; if it were a matter of revenue he was sent to the Exchequer; if the

matter related to the King's grants or other matters cognizable under the Chancellor's ordinary jurisdiction, he was sent to the Chancery."

1 Spence, 332.

"In the reign of Edward I., the English Justinian in more than one sense, we begin to observe unequivocal marks of an extraordinary jurisdiction exercised in the Chancery in civil cases. It was a custom with this monarch to send certain of the petitions addressed to him praying extraordinary remedies, to the Chancellor and Master of the Rolls, or the Chancellor or the Master of the Rolls alone, by writ under the privy seal (which was the usual mode by which the King delegated the exercise of his prerogative to the council) directing them to give such remedy as should appear to be consonant to honesty *(honestati)*. * * When the Chancellor administered relief independently of the Council it was by express delegation from the King, and given as it would seem, by the advice of the Council. It will be remembered that it was in the 13th year of the same King that the Statute of Westminster the Second, which authorised the granting of writs in *consimili casu*, was enacted, by which the necessity for many of these applications must have been superseded."

1 Spence, 335-6.

It was in the 8th year of this King (Ed. I.) that an ordinance was passed, wherein it is recited that the people who came to Parliament were often delayed and disturbed to the great grievance of them, and of the court, by the multitude of petitions laid before the King, the greater part whereof might be dispatched by the Chancellor, and by the Justices; therefore it is provided that all the petitions which concern the Seal shall come first to the Chancellor; and those which touch the Exchequer, to the Exchequer; and those which concern the Justices and the law of the land to the Justices; and those which concern the Jews, to the Justices for the Jews, and if the affairs are so great, or if they are of grace, that the Chancellor and others cannot do it without the King, then they shall bring them with their own hands before the King to know his pleasure; so that no petitions shall come before the King, and his Council, but by the hands of the said Chancellor, and other chief Ministers; so that the King and his Council may without the load of other business, attend the great business of his realm and of other sovereign countries.

In the reign of Edward III., the Court of Chancery appears as a distinct court for giving relief in cases which required extraordinary

remedies. "The King being, as may well be conceived, looking at the history of his busy reign, unable from his other avocations to attend to the numerous petitions which were presented to him, he, in the twenty-second year of his reign, by a Writ of Ordinance, referred all such matters as were *of grace* to be dispatched by the Chancellor or by the Keeper of the Privy Seal.

The establishment of the Court of Chancery as a regular Court for administering extraordinary relief is generally considered to have been mainly attributable to this or some similar ordinance. It will be observed that it conferred a general authority to give relief in all matters of what nature soever requiring the exercise of the prerogative of grace, differing from the authority on which the jurisdiction of the Courts of Common Law was founded; for there the court held jurisdiction, in each particular case, by virtue of the delegation conferred by the particular writ, and which could only be issued in cases provided for by positive law. This is one of the great and fundamental distinctions between the jurisdiction of the Courts of Common Law and that of the Court of Chancery."

1 Spence, 337-8.

The ordinance or proclamation of 22, Edward

III., above referred to, ran as follows:—"The King to the Sheriffs of London, greeting: Forasmuch as we are greatly and daily busied in various affairs concerning us and the state of our realm of England, we will that whatsoever business, relating as well to the Common Law of our Kingdom as our special grace, cognizable before us, from henceforth be prosecuted as followeth, viz:—The common law business, before the Archbishop of Canterbury elect, our Chancellor, by him to be dispatched; and the other matters, grantable by our special grace, be prosecuted before our said Chancellor or our well beloved clerk, the Keeper of the Privy Seal, so that they, or one of them, transmit to us such petitions of business which without consulting us they cannot determine, together with their advice thereupon, without any further prosecution to be had before us for the same; that upon inspection thereof we may further signify to the aforesaid Chancellor or Keeper our will and pleasure therein; and, that none other do for the future pursue such kind of business before us, we command you immediately upon sight hereof to make proclamation of the premises."

1 Story Eq. sec. 44, note;
And see The Legal Judicature in Chancery Stated, 30-31.

A somewhat different origin of the Chancellor's jurisdiction was suggested by Mr. Yorke, (who afterwards became Lord Hardwicke) in his argument in *Rex* v. *Hare* (1 Strange, 150) where he says:—"The jurisdiction of this Court, as it is a court of equity, is perhaps of all others the most difficult to be traced, both as to its foundation and the time when it had its origin. But I think there have been very great opinions, and I am apt to believe a strict search into antiquity might enable one to show that this jurisdiction also has taken its rise from the Great Seal. For the Chancery being, upon the division of the King's Courts, naturally the *officina justitiæ* from which all original writs issued, and where the subject was to come for remedy in all cases, the Chancellor was applied to in all cases for proper Writs, where the subject wanted a remedy for his right or redress for a wrong that had been done him. But in the execution of this authority, he was confined by the rules of the Common Law, and could award no writs but such as the Common Law warranted; therefore, when such a case came before him, as was matter of trust, fraud or accident (which are the subjects of an equity jurisdiction) the Chancellor could award no writ proper for the plaintiff's case, because the common law afforded no remedy.

Upon this it is not improbable that the Chancellors who were most commonly churchmen, men of conscience, when they found those cases grew numerous, in order to prevent the suitors from being ruined against right and conscience, and that no man might go away from the King's Court without some relief, summoned the parties before them, and partly by their authority and partly by their admonitions, laid it upon the conscience of the wrong doer to do right."

Mr. Madox observes that "The Chancellorship from a small beginning became in process of time an office of great dignity and pre-eminence. When the number of royal charters began to multiply, when the pleas and causes in the King's Courts grew numerous, and when the grandeur of the High Justicier came to decline, the power of the Chancellor waxed (as it seems) greater than it had formerly been. And (if I have observed right) the Chancellor's office received a considerable accession of power and dignity from the greatness of some of the persons who had borne it."

1 Madox' History of the Exchequer, 62.

After the ordinance of Edward III., already referred to, it became the practice to institute suits in equity by a petition or bill addressed to the

Chancellor, without the issue of any preliminary Writ, and if the case was one calling for equitable interference, a writ of subpœna was then issued by command of the Chancellor, but in the name of the King, commanding the defendant to appear before the Court of Chancery to answer the complaint and abide by the order of the Court.

1 Spence, 338-344.

Form of the Pleading.

The bill of complaint consisted of a simple statement of the facts upon which the plaintiff based his claim for relief and from an early period in the history of the court the bill was in English, while the Common Law pleadings until a much later date were in Latin.

The earliest case that has been discovered in which we have the complete proceedings on a bill addressed to the Chancellor is a case of *Hals* v. *Hyncley*, in the reign of Henry V., in which case the plaintiff sought to be restored to the possession of lands of which he claimed to have been wrongfully disseised. The proceedings in this action or suit are set forth in an article in 1 Law Quar. Rev. 443.

Sir William Dugdale, referring to the early use of the French language in pleadings, says:—"These

were first introduced here by King William the First, who having made a full conquest of this realm, for the better establishing thereof, thought it good policy utterly to abolish the English language, and instead thereof plant the French; and therefore ordained that not only the pleadings in Courts should be in that tongue, but that all the children put to school should first learn French and then Latin. But Fortescue addeth another reason for the above, viz., that the French becoming by that conquest masters here might not be deceived in the amount of their revenues."

Dugdale's *Origines Juridiciales*, (3rd Ed.) 95.

"This continued till the reign of Edward III.; who having employed his arms successfully in subduing the *Crown* of France, thought it unbecoming the dignity of the victors to use any longer the language of a vanquished country. By a Statute, therefore, passed in the 36th year of his reign, it was enacted, that for the future all pleas should be pleaded, shown, defended, answered, debated and judged in the English tongue, *but be entered and enrolled in Latin.*"

3 Blk. Com. 318.

In the Common Law Courts "This technical Latin continued in use from the time of its first

introduction, till the subversion of our antient Constitution under Cromwell; when, among other innovations in the law, some for the better and some for the worse, the language of our records was altered and turned into English. But at the restoration of King Charles this novelty was no longer countenanced; the practisers finding it very difficult to express themselves so concisely or significantly in any other language but the Latin. And thus it continued, without any sensible inconvenience till about the year 1730, when it was again thought proper that the proceedings at law should be done in English, and it was accordingly so altered by Statute 4 Geo. II., cap. 26."

3 Blk. Com. 322.

Lord Campbell, in a note to chapter 72 of his Lives of the Lord Chancellors, says:—"The proposition for conducting all law proceedings in English was most strenuously opposed, and seemed to many a more dangerous innovation than the abolition of the House of Lords or the regal office. Whitelock in introducing it was obliged to fortify himself with the example of Moses, and a host of other legislators who had expounded their laws in the vernacular tongue. The reporters who delighted in the Norman-French were particularly

obstreperous. 'I have made these reports speak English," says Styles in his preface, 'not that I believe they will be thereby more generally useful, for I have been always and yet am of the opinion that that part of the Common Law which is in English hath only occasioned the making of unquiet spirits, contentiously knowing, and more apt to offend others than to defend themselves; but I have done it in obedience to authority, and to stop the mouths of such of this English age, who, though they be confessedly different in their minds and judgments, as the builders of Babel were in their language, yet do think it vain, if not impious, to speak or understand more than their mother tongue.' Bulstrode, in the preface to the second part of his reports, says 'that he had many years since perfected the work in French, in which language he had desired it might have seen the light, being most proper for it, and most convenient for the professors of the law.' But the Restoration brought back Norman-French to the reports, and barbarous Latin to the law records, which continued to the reign of George II."

See also "Lives of Lord Chancellors," cap. 126.

From an early period in the history of Chancery procedure the signature of counsel was

required to every bill, which sanction for the issuing of the writ of subpœna was substituted for the personal examination of the bill by the Chancellor, and it was also a security against the introduction of scandalous and irrelevant matter.

1 Spence, 368-9.

This precaution, however, did not always prevent bills from being improperly presented. Thus we are told that a bill was presented by a highwayman seeking relief against his partner and asking for an account of their plunder. The bill stated that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, etc.; that the defendant applied to him to become a partner; that they entered into partnership, and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expenses on the roads and at inns, taverns, alehouses, markets and fairs; that the plaintiff and the defendant proceeded jointly in the said business with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch; and afterwards the defendant told the plaintiff that Finchley, in the County of Middlesex, was a good and convenient place to deal in, and that commodities were very plenty at Finchley, and it would be

almost all clear gain to them; that they went accordingly and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles and other things; that about a month afterwards the defendant informed the plaintiff that there was a gentleman at Blackheath who had a good horse, saddle, bridle, watch, sword, cane and other things to dispose of which he believed might be had for little or nothing; that they accordingly went and met with the said gentleman, and after some small discourse they dealt for the said horse, etc.; that the plaintiff and the defendant continued their joint dealings together until Michaelmas, and dealt together at several places, viz., at Bagshot, Salisbury, Hamstead and elsewhere to the amount of £2,000 and upwards. The rest of the bill was in the ordinary form for a partnership account. The bill is said to have been dismissed with costs to be paid by the counsel who signed it; and the solicitors for the plaintiff were attached and fined £50 apiece. The plaintiff and the defendant were, it is said, both hanged, and one of the solicitors for the plaintiff was afterwards transported for some crime.

Everet v. Williams.

Lindley on Partnership, 5th Ed., 93, note; 20 Eq. 230, note; 11 Chy. D. 195.

There was no practice of the Court requiring the plaintiff's replication to the defendant's answer to be signed by counsel, and as a consequence replications were frequently referred to the Masters of the Court to report as to those portions of the pleadings which were scandalous and impertinent, and severe punishment was meted out to the persons who inserted the scandalous and impertinent matter. Mr. Spence has extracted from the Registrar's books some of the orders made upon such occasions. One of these orders was made in 1596, and after reciting that it appears by the report of the Master of the Rolls that the plaintiff's replication doth amount to six score sheets of paper, and yet all the matter thereof which is pertinent might have been well contrived in sixteen sheets of paper, wherefore the plaintiff was appointed to be examined to find out who drew the same replication and by whose advice it was done, to the end that the offender might for example's sake, not only be punished, but also be fined to her Majesty for that offence; and that the defendant might have his charges sustained thereby, it proceeds in these words:—"And for that it now appears to his Lordship, by the confession of Richard Mylward, *alias* Alexander, the plaintiff's son, that the said Richard himself did both draw, devise and engross

the same replication, and because his Lordship is of opinion that such an abuse is not in any sort to be tolerated—proceeding of a malicious purpose to increase the defendant's charge and being fraught with much impertinent matter not fit for the Court. It is therefore ordered that the Warden of the Fleet shall take the said Richard Mylward, *alias* Alexander, into his custody, and shall bring him into Westminster Hall on Saturday next about ten of the clock in the forenoon, and then and there shall cut a hole in the midst of the same engrossed replication, which is delivered to him for that purpose, and put the said Richard's head through the same hole, and so let the same replication hang about his shoulders with the written side outward, and then, the same so hanging, shall lead the said Richard round about Westminster Hall while the Courts are sitting, and shall show him at the Bar of every of the three Courts within the Hall, and then shall take him back again to the Fleet and keep him prisoner until he shall have paid £10 to her Majesty for a fine, and 20 nobles to the defendant for his costs in respect of the aforesaid abuse, which fine and costs are now adjudged and imposed upon him by this Court for the abuse aforesaid."

1 Spence, 376, note.

A few of the Bills presented in the early days of the Court are set forth in 2 C. P. Cooper, 528 *et seq.*, and 30 *et seq.* One of these was presented in the reign of Richard II., and runs as follows:—"To their very gracious Lord the Chancellor of England—Beseech humble your poor orators, Thomas Swan and Johan, his wife, late wife of Robert Sprunt, of Oxford. That whereas one John Sprunt, father of the above said Robert, on his dying bed at Oxford, the 7th day of June, in the 7th year of the reign of our Lord the King that now is, made his will and according to the custom and usage of the said town of Oxford, devised his lands and tenements in the said town of Oxford, because that the tenements in the said town are devisable by the said custom, to the said Johan and to the children of her body by the said Robert begotten, of the which tenements he was then seized, and also his goods and chattels as appeareth by the said will more plainly, and made his executrix the said Johan, now the wife of the said Thomas Swan, and died; after whose death came one Thomas Chesterfield, of Ireland, parson of the Church of St. Peter in the bailly of Oxford, curator of the soul of the above said Johan, and specially of her counsel, imagining falsely and by deceit to deceive the said Johan

and undo the said true testament long time after the death of the said John Sprunt, made and forged at Oxford a false will written by his own hand, making himself sole executor to the above said testator, and that the above said testator had to him devised and given the residue of all the goods and chattels beyond his devise in the said false will devised, as appears by the above false will, which amounts to six marcs and more. And afterwards, by the colour of the said false will, the houses of the said Johan as she was sole at Oxford, broke into, and £160 in gold numbered, being in a bag, and forty cloths of scarlet, violet and mixed and other cloths of the above said Johan, to the value of £100 there found, against the peace of our Lord the King, took and carried away to the wrong and retardation of the said true will of the said testator; and to the final destruction and disinheriting of the said Johan and her children, issue of the said Robert, son of the said testator. Whereof they pray remedy for God, and in work of charity, having consideration that other remedy they cannot have in destruction of the aforesaid false will, if not by examination and your gracious aid. Nicholas Hinchon and William Wynnesbury pledges to prosecute."

There is a striking similarity between this and and a modern Bill in Chancery in every respect save only that the plaintiffs do not pray for their costs of suit. Possibly this is accounted for by the fact that it was not until the 17th year of this reign that the Chancellor by virtue of a Statute (cap. 6), was authorized to award costs even as against a plaintiff whose bill was dismissed.

Dealing with the question of costs, and referring to the time of Queen Elizabeth, Lord Campbell in his Lives of the Lord Chancellors, (cap. 48), says:—"Full power was now assumed of granting costs in all cases—which gradually superseded the practice introduced by 17 Richard II., cap. 6, and 15 Henry VI., cap. 4, of requiring before issuing the subpœna, security to pay damages to the defendant if the suggestions of the bill should turn out to be false; and the scruple was at last got over of allowing costs to the defendant on a demurrer to the bill for want of equity, although the suggestion contained in it were thereby admitted to be true."

Another of the bills reproduced in Cooper's Reports was presented in the 17th year of Richard II., by the the Mayor and citizens of Chichester, praying remedy against the defendants who, coming

with great crowds of armed people, disturbed the bailiffs of the plaintiffs in collecting the customs.

Another Bill seeks to recover a messuage and lands "the beseecher not being of might and power to bear a writ of right."

Writ of Subpœna:

During the reign of Richard II. the writ of subpœna was invented, and this writ played a considerable part in the struggle for jurisdiction which was maintained by the Court of Chancery in the early days of its existence. The writ is said to have been invented by John Waltham, who was Master of the Rolls in the 5th year of the reign of Richard II. The writ was issued by the command of the Lord Chancellor, in the name of the King, and it commanded the defendant to appear before the Court of Chancery and answer the plaintiff's complaint, and abide by the order of the Court, and a penalty was added in the event of disobedience, from which the writ obtained the name subpœna. If the defendant did not after service of the writ appear personally before the Court, at the day named, to answer the plaintiff's complaint and abide by the order of the Court, he was treated as acting in contempt of the Court and an attachment was issued against him. In early times the sheriff

was ordered to distrain upon the goods of the defendant for the recovery of the penalty if he made default, but the later practice was that the defaulting defendant was taken into custody and fined at the discretion of the Court. In one case the plaintiff prayed in his bill for a subpœna to the sheriff to serve the ordinary subpœna in the action upon the defendants, as he, the plaintiff, did not dare to serve it himself. Among the people there was great antipathy to this writ, and it was a common thing to inflict personal violence upon the servers. One of these process servers complained to the Court that he had been forced to eat the subpœna which he was attempting to serve.

3 Blk. Com. 51 : 443-4.

1 Spence, 338, 345, 369, 370.

Preventive Jurisdiction:

Another reason, which lead to the rapid growth of this Court's influence, was that it was the only Court which exercised a preventive jurisdiction, and by means of injunctions prevented the happening of threatened wrongs either of omission or of commission. The Courts of Common Law on the other hand were unable, by any practice known to those Courts, to do more than award

damages for a wrong, which might in its nature be irreparable.

1 Spence, 344.

Afforded Protection to the Poor and Weak:

Mr. Spence thus states another cause which increased the business of the Court:—"In the reign of Richard the unsettled state of the country tended to encourage every sort of violence; the necessity for more than the ordinary means of protection from oppression and spoliation was obvious. The Justices were overawed, and in some instances the very powers which were confided to them, were employed as instruments of oppression, so that in a subsequent reign it was found necessary to place the Justices themselves under the especial supervision of the Chancellor. The Chancellor, therefore, at the very outset of Richard's reign, the King being himself of tender years, with the sanction no doubt of the council, exercised an authority especially in favor of the weak, for repressing disorderly obstructions to the course of the law and punishing the defaults of the officers who were intrusted with its administration, and affording a civil remedy in cases of violence and outrage, which, for whatever might be the reason, could not be effectually redressed through the ordinary

tribunals. * * * The Commons seem to have taken great umbrage at this exercise of authority on the part of the Chancellor, particularly as the Chancellor did not scruple to entertain jurisdiction in case of violent dispossession of land, which was an interference with *franc tenement*, of which they were very jealous. The Commons required that all such cases should be left to the Common Law; but the Chancellor, supported by the Council, and under the shield of the clerical character, persevered against all opposition in exercising this branch of the prerogative in the Council and in the Court of Chancery, and a resort to the Chancellor, under his extraordinary jurisdiction, was thus secured for the poor, the weak and the friendless, to protect them from the injuries to which they were exposed."

1 Spence, 343, and see note 1, page 353. As to criminal jurisdiction see page 685 *et seq.*

Lord Chancellor Ellesmere, describing the Court, says:—"It is the refuge of the poor and afflicted, it is the altar and sanctuary for such as against the might of rich men and the countenance of great men, cannot maintain the goodness of their cause and the truth of their title."

See 1 Spence, 343, note.

Examined Parties on Oath:

An important difference between the method of procedure in Chancery and that in the Common Law Courts was that the former was the only Court in which the defendant could be forced to verify his defence by his oath, and could be personally examined upon oath touching the subject matter of his defence.

1 Spence, 339, 343.
1 Blk. Com. 382-3, 437-8, 446-7.

Hallam, referring to the origin of the jurisdiction as to injunctions to restrain proceedings at law, says:—"This originated in the practice of feoffment to uses, by which the feoffee who had legal seisin of the land, stood bound by private engagement to suffer another, called the *cestui que use*, to enjoy its use and possession. Such fiduciary estates were well known to the Roman jurists, but inconsistent with the feudal genius of our law. The Courts of justice gave no redress, if the feoffee to uses violated his trust by detaining the land. To remedy this, an ecclesiastical Chancellor devised the writ of subpœna compelling him to answer upon oath as to his trust. It was evidently necessary also to restrain him from proceeding, as he might do, to obtain possession; and

this gave rise to injunctions, that is, prohibitions to sue at law, the violation of which was punishable by imprisonment as a contempt of Court. Other instances of breach of trust occurred in personal contracts, and cases also wherein, without any trust, there was a wrong committed, beyond the competence of the Courts of Law to redress, to all which the process of the subpœna was made applicable. This extension of a novel jurisdiction was partly owing to a fundamental principle of our Common Law, that a defendant cannot be examined; so that, if no witness or written instrument could be produced to prove a demand, the plaintiff was wholly debarred of justice."

1 Hal. Const. Hist. 339.

Dr. Woodeson in his Lectures deals with this matter as follows:—"The Common Law forbids any man to be sworn in his own cause, because, adhering to general principles, it will not administer temptation to perjury; and in Courts of Equity, certain bounds are set to the requisition. Whether the due limits are defined is very difficult to ascertain. The principal restrictions are, that no man is compellable to give any answer whereby he might confess an indictable crime, or incur a penalty, nor in general to divulge the title of his

estate. But to discover the consideration of a bond, charged to be fraudulently obtained, and to unravel other tissues of deceit, conduces, we may reasonably hope, to more good than evil, and is much oftener instrumental to the ends of justice than subservient to perjury and surreptitious concealment."

1 Woodeson's Lectures, 123.

Lord Eldon in his judgment in *Evans* v. *Bicknell*, (6 Ves. 174), delivered in 1801, discusses at some length the effect of the difference between the Common Law rule and the Chancery rule as to the admission of the evidence of parties, and among other things he says, (at page 184):—"A defendant in this Court has the protection arising from his own conscience in a degree, in which the law does not affect to give him protection. If he positively, plainly and precisely, denies the assertion, and one witness only proves it as positively, clearly and precisely, as it is denied, and there is no circumstance attaching credit to the assertion overbalancing the credit due to the denial, as a positive denial, a Court of Equity will not act upon the testimony of that witness. Not so at law. There the defendant is not heard. One witness proves the case; and, however

strongly the defendant may be inclined to deny it upon oath, there must be a recovery against him."

It was not until 1851 that in the Common Law Courts a defendant was either competent or compellable to give evidence in an action.

It must be borne in mind that although the Courts of Equity would from a very early period compel a defendant to verify his defence upon oath and would allow the plaintiff to cross-examine the defendant upon his answer, yet they did not permit the defendant to search the conscience of the plaintiff in a similar manner. If the defendant desired to get the plaintiff's evidence upon oath it was necessary for him to file a Cross Bill against the plaintiff, in which proceeding the original plaintiff became a defendant, and as a defendant he was liable to have his conscience probed according to the practice of the Court.

In 1851 Lord Brougham's Act, (14 & 15 Vic., cap. 99), was passed, by which the Courts of Equity and of Common Law were placed upon an equal footing in this respect.

The second section of that Act provides that "On the trial of any issue joined, or of any matter or question, or any inquiry arising in any suit,

action or other proceeding in any Court of justice, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action or other proceeding may be brought or defended, shall except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action or other proceeding."

There were certain exceptions to the operations of the Act which it is unnecessary to notice here.

An interesting account of the introduction of that Act is given in the notes to sections 1348 and 1349 of Taylor on Evidence.

Pliable Forms of Judgment :

" The judgments of the Common Law following the writ on which the action was founded, were uniform, simple and invariable, according to the nature of the action, as that the said William recover seisin, or his term of years, or his damages, (specifying the sum) by occasion of the not performing the alleged promises and undertakings. In the Court of Chancery no writ or formula of action

imposed any fetter of form; and the Court not being tied to forms, was able to modify the relief given by its decrees to answer all the particular exigencies of the case fully and circumstantially—to make binding and authoritative declarations concerning the rights alleged—to direct many things to be mutually done and suffered, and to trace out the conduct to be respectively observed by the several parties to the suit, the parties being frequently very numerous, and sustaining various relations, some of those who were named as defendants having, perhaps, the like interest and object as the plaintiff. This alone created a wide difference between proceedings in a suit in Chancery and an action at law; besides which the Court of Chancery might retain the cause till, by means of successive orders, all the ends of justice in reference to all the parties interested were effectually carried out."

1 Spence, 390.
And see 1 Woodeson's Lectures, 121.

Mr. Spence referring to this subject before the adoption of an uniform practice in law and equity, which now prevails in this Province, and in some other jurisdictions, says:—"It is this pliability of the decrees and orders of the Court of Chancery

added to the power which the Court has of bringing all parties having claims on any given subject before it, and of ascertaining by inquiry before its own officers or otherwise, every fact necessary for a final adjustment of every question that may arise in respect of the matter of the suit, that has brought to the Court of Chancery a vast proportion of the business over which it entertains a jurisdiction, and which could not possibly be left to any of the Courts of Law unless their constitution and modes of procedure in every respect were entirely reconstructed, or a separate Court for administrative business were added to their present establishment."

1 Spence, 390-391.

Examples of judgments of the sort referred to may be found in the ordinary forms of judgment for partition of lands, or the administration of an estate, or setting aside a fraudulent conveyance, or enforcing a mechanic's lien, or in the various classes of mortgage actions.

The poet Cowper has humorously illustrated the pliable nature of judgments in equity in his

Report of an Adjudged Case not to be found in any of the books.

"Between Nose and Eyes a strange contest arose;
The spectacles set them unhappily wrong;

The point in dispute was, as all the world knows,
To which the said spectacles ought to belong.

So the Tongue was the lawyer and argued the cause
With a great deal of skill, and a wig full of learning,
While Chief Baron Ear sat to balance the laws
So famed for his talent in nicely discerning.

'In behalf of the Nose, it will quickly appear,
And your Lordship,' he said, 'will undoubtedly find,
That the Nose has had spectacles always in wear,
Which amounts to possession, time out of mind.'

Then holding the spectacles up to the Court,
'Your Lordship observes they are made with a straddle,
As wide as the ridge of the Nose is, in short,
Designed to sit close to it, just like a saddle.

Again would your Lordship a moment suppose,
('Tis a case that has happened and may be again),
That the visage or countenance had not a nose,
Pray, who could or who would wear spectacles then?

On the whole it appears, and my argument shows,
With a reasoning the Court will never condemn,
That the spectacles plainly were made for the nose,
And the nose was as plainly intended for them.

Then shifting his side, as a lawyer knows how,
He pleaded again on behalf of the Eyes,
But what were his arguments few people know,
For the Court did not think they were equally wise.

So his Lordship decreed, with a grave, solemn tone,
Decisive and clear, without one if or but,—
That whenever the Nose put his spectacles on,
By day light or candle light, Eyes should be shut."

Absence of Fines:

Another reason which doubtless contributed to popularize this Court and increase the volume of its business was the absence of those vexatious fines, which were usual at Common Law, and which were so burdensome as to induce the Barons to insist upon the clause in Magna Charta whereby the King promises that "To none will we sell, to none will we deny or delay right or justice."

At the Common Law it was usual for suitors to have to pay a fine to the King for the writ by which their action was commenced, and to pay further fines for the taking of almost every important step in the cause. Thus they had to pay fines to procure leave to plead certain facts or to estop their adversaries from pleading certain facts, and to expedite the trial of their action, and to procure the delivery of judgment therein; and when the action was to recover a debt, they were fined for recovery thereof in proportion to the amount recovered, amounting often to a fourth part or a third part, or even to half of the debt sued for; and after the plaintiff had paid his fine to expedite any particular step in the cause, he was liable to have his proceedings either stayed or delayed by his opponent outbidding him and procuring the King's writ for delay.

Madox, in chapter XII of the first volume of his History of the Exchequer, collects numerous instances of these fines, which he classifies under the following heads :—

1. Of fines to have justice and right.

2. Of fines for writs, pleas, trials and judgment.

3. Of fines for expedition of pleas, trials and judgments.

4. Of fines for delay thereof.

5. Of fines payable out of the debt recovered.

After dealing fully with this question of fines, Madox says :—"Although fines for writs and process of law in many cases were always a part of the Crown Revenue (viz., from the time of the Conquest or soon after) and were constantly paid, as well after the making of the great charters as before ; yet, if my observation does not fail me, the fines which were paid for writs and process of law, were more moderate after the making of those great charters than they used to be before ; and, I think the actual denial of right and the stopping and delaying of it, which before, upon paying of money or fines, used to be practiced, were by those charters quite taken away, or by degrees brought into disuse."

1 Madox' History of the Exchequer, 455.

This system of fining suitors appears to have afforded one of the chief reasons for the maintenance of such Courts as the Manorial Courts in which justice was sold for the benefit of the Lord of the Manor. The Selden Society has given us a volume of "Select Pleas in Manorial Courts," and from the records therein published it is evident that the imposition of fines was looked upon as the most important functions of those Courts. Thus we find for example at page 17 of the said volume that at a sittings of a Manorial Court, held in 1248, "John Henry's son gives 3*s*., and if he recovers he will give three marks for having a jury of twelve men to inquire whether he has the greater right in a moiety of a virgate of land," which is claimed by the three defendants. The record then sets out the names of the twelve persons, "who being sworn come and say that the said John has no right in the said land. Therefore it is considered that the said tenants do go thence without day and that the said John, do pay 3*s*. for which Godfrey Francis and Godfrey Taylor are pledges."

At page 19 of the same volume we find that in 1249, "It was presented that Stephen Shepherd by night struck his sister with a knife and grievously wounded her. Therefore let him be com-

mitted to prison. Afterwards he made fine with 2*s*."

At page 24 of the same volume we find, that in 1275, "A certain unknown man gives the Lord 20*s*. for leave to contract marriage with a certain widow;" but William Fleming was less fortunate as he had in the same year to pay £4 for leave to contract marriage with widow Susan.

These examples are taken almost at random, but they are fair examples of the records which fill a large portion of the volume and which show that whether the judicial proceeding was had with regard to licence, property rights, contracts, torts or crimes, the main feature in the proceeding was the imposition of the fine.

Dealing with this question of fines Hallam says:—"But of all the abuses which deformed the Anglo-Norman government none was so flagitious as the sale of judicial redress. The King, we are often told, is the fountain of justice; but in those ages it was one which gold alone could unseal. Men fined to have right done to them; to sue in a certain Court; to implead a certain person; to have restitution of land which they had recovered at law. From the sale of that justice which every citizen has a right to demand, it was an easy tran-

sition to withhold or deny it. Fines were received for the King's help against the adverse suitor; that is, for perversion of justice, or for delay. Sometimes they were paid by opposite parties, and of course, for opposite ends. These were called counter-fines; but the money was, sometimes, or as Lord Littleton thinks, invariably returned to the unsuccessful suitor."

Hallam's Middle Ages, cap. VIII, part II.

Length of Suits:

It was frequently made a subject of adverse criticism that suits in Chancery were not speedily determined and that it was not an uncommon thing for twenty or thirty years or more to elapse between the commencement and the final ending of a suit in that Court. This prolongation of suits however, in many cases, resulted necessarily from the nature of the subject matter of the suit, and was not due to any fault of the Court or its officers, or to any defect in the practice of the Court. A large proportion of the business of the Court was of an administrative rather than of a strictly litigious character, and the Court filled in great measure the position of an administrator or trustee, and superintended the conversion and collecting in of the assets of an estate, and caused

inquiries to be made as to all persons interested in the estate, and caused all such persons to be made parties, and ascertained and declared the rights and obligations of all such parties, and distributed the estate among the parties found entitled, and retained the shares of those parties who were under disability, and caused the same to be invested, and appointed trustees, committees and guardians, and paid out moneys from time to time for the support, maintenance and education of minors, lunatics and others, and made all inquiries, directions and orders necessary for the protection of the funds in Court and of the rights and interests of all persons interested in those funds, until by devolution or lapse of time the title to the funds became vested in persons who were *sui juris* and entitled to the immediate possession thereof.

This subject is dealt with in a report made in 1826 by Lord Eldon, Lord Gifford, Sir John Leach and others, who had been appointed Commissioners to make inquiry, among other things, whether any and what alterations should be made in the practice established in the Court of Chancery. They say:—"We think it indeed obvious from the nature of these subjects and of the relief which the Court of Chancery administers, that, in

very many cases, its proceedings cannot be rendered short or summary, and that, in considering its rules of practice, little analogy can be drawn from the Courts of Common Law.

To unravel a long chain of fraud and by a comprehensive decree to counteract the unjust consequences which have arisen or may arise from it;—To investigate accounts, frequently complicated, between persons who employ all their arts to perplex and resist;—To enforce agreements for the conveyance or transfer of property, in which many persons are interested and long examinations of title are necessary;—To compel the correction of mistakes by which rights have been acquired, according to the strict letter of the Common Law, but contrary to justice;—To administer a large property encumbered with debts and involved in various difficulties, and to draw out a surplus, to be distributed according to the complicated rights of creditors and various other claimants;—To attain these and similar important objects, and to attain them by means, in great measure, of discovery and admissions, which are to be extracted from unwilling or prevaricating defendants, must be the work of time.

The term '*Delay*' has indeed been so frequently misapplied, as to convey a very incorrect

idea with respect to the duration of a suit in Chancery. Besides the considerations to which we have already adverted, it is material to observe that a large portion of the suits in Chancery embrace the administration of Trusts; and that such suits must beneficially endure as long as the trust continues. It is obvious that, in the common case of bills filed for the protection of the property of infants, the suit must last until such infants attain their ages of twenty-one years; and many trusts are of much longer duration; and the protection of property by the Court and consequently the existence of the suit, is necessarily continued until some person becomes the absolute owner of the property administered. And, as the law permits property to be so limited that it may become inalienable for any number of lives in being and twenty-one years more, it may therefore happen, and often does happen, that, in this sense, a Chancery suit will usefully endure for more than half a century."

It must be admitted, however, that in the early days of English history neither the Court of Chancery nor the Courts of Common Law administered justice with that expedition which is both necessary and usual at the present day. In the Appendix to the Reports of C. P. Cooper at page

577, there are given fragments of a plaintiff's narrative of a suit in the reign of Henry II., which he followed in person from A.D. 1158 until 1163. The narrative is highly instructive as indicating the defects and abuses of the legal procedure of the day, and it would be highly amusing if one could forget his sympathy for the unfortunate plaintiff.

As showing the great number of persons who may be made parties to a suit in Chancery, reference may be had to *Fordyce* v. *Bridges*, which is reported in 2 C. P. Cooper, 324.

Abuse of Chancery Procedure by Vexatious Suits:

The comparative pliability of the Chancery procedure afforded peculiar facilities to those evilly disposed persons who desired to harass and coerce their neighbors by vexatious suits.

This became an abuse in the course of time, and in a pamphlet written in the reign of King James I. we find the following complaint:—"It is to be observed that of ten bills brought into this Court, hardly three have any colour or shadow of just complaint. The rest are *omni fundamento carere* and to be exhibited either by malice, or out of a turbulent humour wherewith too many are possessed, or else to shelter themselves for a while

from some imminent storm. Wherein as many times the remedy proves worse than the disease; so if they were all forced as aforesaid to come to the touch (that is, to hearing where their nakedness will soon appear) and there, if their causes be frivolous, were to be well lashed with costs, it will make them, and others from their examples, more wary how they trouble their neighbors and the Court so idly as they do. For what a miserable thing it is, that the plaintiff should bring the defendant from the fartherest part in England to answer an idle bill; which done, he will, perhaps, quarrel at some point of the answer, get it referred to a Master of the Chancery and subsequently overruled for insufficient; and so having vexed and put him to great expenses, leaves him in the end to wipe his nose on his sleeve for any recompence he shall get, be the cause ever so ridiculous."

"The Abuses and Remedies of Chancery," published in Hargrave's Law Tracts at pp.-434-5.

Parliamentary Recognition of the Court:

We have seen that the Court of Chancery originally derived its jurisdiction, not from any Act of Parliament, but from the delegation by the King to the Chancellor of the right to exercise the pre-

rogative of the Crown as the fountain of justice; we have also seen that the jurisdiction exercised by the Chancellor provoked the jealousy of the Commons and led to protests and opposition from that body. This opposition, however, failing to extinguish the jurisdiction of the Chancellor, the Commons set to work to remedy what they considered to be the abuses of the system, and in the 17th year of the reign of Rich. II. Parliament passed a Statute (cap. 6) whereby it was enacted that "Forasmuch as people be compelled to come before the King's Council or in Chancery by Writs grounded upon untrue suggestions, that the Chancellor for the time being, presently after that such suggestions be duly found and proved untrue, shall have power to ordain and award damages according to his discretion, to him which is so troubled unduly as afore is said."

This Statute not only gave the Chancellor power to prevent his jurisdiction being abused, but it also contained a Parliamentary recognition of that jurisdiction. This power of the Chancellor was supplemented and made obligatory by 15 Hen. VI. cap. 4, which recited that persons have been greatly vexed and grieved by Writs of subpœna in subversion and impediment of the Common Law, and enacted that "No writ of subpœna be granted

from henceforth until surety be found to satisfy the party so grieved and vexed for his damages and expenses, if so be that the matter cannot be made good which is contained in the bill."

Blackstone says that "It appears from the Parliament rolls that in the reigns of Henry IV. and V. the Commons were repeatedly urged to have the writ of subpœna entirely suppressed, as being a novelty devised by the subtilty of Chancellor Waltham against the form of the Common Law; whereby no plea could be determined, unless by examination and oath of the parties, according to the form of the law civil, and the law of holy church, in subversion of the Common Law. But though Henry IV. being then hardly warm in his throne, gave a palliating answer to their petitions, and actually passed the Statute 4 Henry IV. cap. 23, whereby judgments at law are declared irrevocable, unless by attaint or writ of error, yet his son put a negative at once upon their whole application; and in Edward IV.'s time the process by bill and subpœna was become the daily practice of the Court."

3 Blk. Com. 52.

Influence of the Roman Law:

From the time of the Conquest down to the time of Edward III. it was customary for the

Kings of England to pay a money tribute to the Court of Rome. From time to time the payment of this tribute had been refused but such refusal was always followed by coercive measures and further exactions on the part of the papal power. The result was that among the laity of all ranks a general distaste sprang up for everything connected with the Holy See. Even the Roman Law, which had previously been in considerable favor, became an object of aversion, and in the reign of Richard II. the Barons protested that they would never suffer the kingdom to be governed by the Roman Law, and the judges prohibited it from being any longer cited in the Common Law tribunals.

Nearly all of the early Chancellors were ecclesiastics and they from their sympathies and education were favorably inclined to the Roman Law, as a system of law replete with principles well fitted to supplement the defects and soften the asperities of the Common Law.

The result was that the Common Law judges as a general rule refused to look to the Roman Law as affording any guide to be followed in the development of the Common Law, while the Chancery judges, on the other hand, fashioned and moulded their equity system, to a great extent, out

of principles and doctrines selected from the rich storehouse of the Roman Law.

The further result followed that a distinct code of laws was formed and administered in the Court of Chancery, by which the enjoyment and alienation of property were regulated on principles varying in many essential particulars from the system which those who originated and carried into effect the exclusion of the Roman Law were so anxious to preserve.

See I Spence 346-7.

The principal doctrines so borrowed from the Roman Law and incorporated into the English Equity Jurisprudence, in a more or less modified form, are the doctrines relating to trusts, equitable liens, equitable election and injunctions.

The view here presented as to the Romanizing tendency of our early equity jurisprudence, and of the officers of the Court of Chancery, is what may be called the current view, and is in accordance with what we find laid down in almost every book dealing with the subject; we also find it currently stated that not only were the early Chancellors dominated by this Romanizing tendency, but so also were the Masters and other Clerks in Chancery, and that the whole body of Chancery officialdom

looked down upon and despised the Common Law as a barbarous system unworthy of their acceptance.

Professor Maitland does not agree with this statement of the case, and in a recent article upon the Register of Original Writs, he says :—"Any notion that the Chancery was a Romanizing institution, that the learning of the Masters was the learning of Civilians, is rudely repelled by the Register. Whatever academic training in Roman and Canon Law the Masters may have had, they were English lawyers, daily engaged in watching the development of English law in the English Courts, in reading the Year Books, and in 'writing up' decisions in the margins of their Registers."

3 Harvard Law Rev. 104-5.

Clerical Chancellors:

The clerical character of the early Chancellors stamped itself upon the jurisprudence of the Court founded by them, and we see its effect even in the judgments of those Chancellors who were not ecclesiastics. Lord Chancellor Ellesmere commences his judgment in the *Earl of Oxford's case* (I Ch. Rep. I) as follows :—

"1. The law of God speaks for the plaintiff, Deut. xxviii.

"2. And equity and good conscience speak wholly for him.

"3. Nor does the law of the land speak against him. But that and equity ought to join hand in moderating and restraining all extremities and hardships.

"By the law of God he that builds a house ought to dwell in it; and he that plants a vineyard ought to gather the grapes thereof; and it was a curse upon the wicked that they should build houses and not dwell in them, and plant vineyards and not gather the grapes thereof. Deut. XXVIII., 30.

"And yet here in this case such is the conscience of the doctor, the defendant, that he would have the houses, gardens and orchards which he neither built nor planted; but the Chancellors have always corrected such corrupt consciences and caused them to render *quid pro quo;* for the Common Law itself will admit no contract to be good without *quid pro quo*, or land to pass without valuable consideration; and therefore equity must see that a proportionable satisfaction be made in this case;" and further on in the same judgment he says:—"And equity speaks as the law of God speaks; but you will silence equity, *first*, because you have a judgment at law; *secondly*, because that judgment is upon a

Statute." And again he says :—"The office of the Chancellor is to correct men's consciences for frauds, breaches of trust, wrongs and oppressions of what nature soever they be, and to soften and mollify the extremity of the law, which is called *summum jus*. And for the judgment, etc., law and equity are distinct, both in their courts, their judges and the rules of justice; and yet they both aim at one and the same end, which is to do right; as justice and mercy differ in their effects and operations yet both join in the manifestation of God's glory * * * * A serjeant is sworn to give counsel according to law, that is, according to the law of God, the law of reason, and the law of the land; and upon both the laws of God and reason is granted that rule, viz., To do as one would be done unto. And therefore, where one is bound in obligation to pay money, payeth it, and takes no acquittance, by the Common Law he shall be compelled to pay the money again. But when it appeareth that the plaintiff will recover at law, the serjeant may advise the defendant to take a subpœna in Chancery, notwithstanding his oath."

The same thing is shown in an extract from a judgment delivered by Archbishop Morton, L.C., in the time of Henry VII., extracted by Reeve in his History of English Law, in which the Chancellor

says :—" I know very well that every law should be consistent with the law of God, and that law forbids that an executor should indulge any disposition he may have to waste the goods of the testator ; and if he does and does not make amends, if he is able, he shall be damned in Hell."

Reeve's History of English Law, cap. 27.

This judgment has about it a truly clerical ring, and in the suggested declaratory relief it would seem to somewhat exceed even the far reaching jurisdiction of a Chancellor. We may assume, however, that by analogy to the principle of *Cadell* v. *Palmer* (I Cl. & Fin. 472), which was doubtless at that time *in nubibus*, the irate Chancellor did not intend to make a declaration of right which was to extend throughout eternity, but intended rather to limit its effect to a life or lives in being, together with a further period in gross of twenty-one years.

Lord Campbell says :—" Equity decisions at this time depended upon each Chancellor's peculiar notions of the law of God, and the manner in which heaven would visit the defendant for the acts complained of in the bill ; and though a rule is sometimes laid down as to where 'a subpœna will lie,' that is to say, where there might be relief in Chancery, it was not till long after that author-

ities were cited by Chancellors, or that there was any steady reference by them to 'the doctrine of the Court.'"

Lives of the Ld. Chrs., cap. 26.

The hostility of the Common Law lawyers to the Court of Chancery was not at all lessened by the fact that the greater portion of the early Chancellors were ecclesiastics. In a pamphlet written in the reign of Henry VIII., as a reply to Saint Germain's "Doctor and Student," the student asks a serjeant at law how it is that the Chancellor of England has set aside the Common Law and substituted therefor his own conscience and discretion, to which the serjeant answers:—"Verilie I thinke for lacke of knowledge of the goodness of the lawes of the realme; for moste commonly the Chancellors of England have been spiritual men that have had but superficial knowledge in the lawes of the realme; and when soch a byll hath been made unto them, that soche a man should have greate wronge to be compelled to paie two times for one thinge, the Chancellour, not knowing the goodness of the common law, neyther the inconvenience that mighte ensue by the saide writ of subpœna, hath temerouslye directed a subpœna to the plaintiff in the King's name, commandinge

him to cease his suite that he hath before the King's justices, and to make annsweare before him in the Chauncerie ; and he regardinge no lawe, but trustinge to his owne wit and wisdom, giveth judgment as it pleaseth himselfe, and thinketh that his judgment being in soche authoritie, is farre better and more reasonable than judgments that be given by the King's justices accordinge to the common lawe of the realme. In my conceite in this case I may liken my Lord Chauncelor, which is not learned in the lawes of the realme, to him that stands in the Vale of White Horse, farre from the horse and holdeth the horse; and the horse seemeth and appeereth to him a goodly horse and well proportioned in every poincte, and that if he come neere to the place wher the horse is, he can perceave no horse nor proportion of any horse. Even so it fareth by my Lord Chauncelor that is not learned in the lawes of the realme ; for when such a bill is put unto him, it appeareth to him to be a matter of great conscience and requireth reformation ; and the matter in the bill appeareth so to him, because he is farre from the understandinge and the knowledge of lawe of the realme and the goodness thereof; but if he drawe neere to the knowledge and understanding of the common lawe of the realme, soe that he maie come to the perfecte know-

ledge and goodness of it, he shall well perceive that the matter contayned in the bill put to him in the Chauncerie is no matter to be refourmed there, and namelie in soche wise as is used."

Hargrave's Law Tracts, 326-7.

Mr. Spence says with regard to the great influence and great presumption of the early Chancellors :—"No one but a dignified ecclesiastic would ever have thought of establishing a Court, constituted in effect of one man, for the correction of the law, when there was a legislature, consisting of King, Lords and Commons, who were engaged at the very time in providing for the amendment of the law and securing its due administration."

1 Spence, 356.

The following extract is taken from the preface to Nelson's Reports :—"In former ages, and until the fall of Cardinal Wolsey, the Lord Chancellor of England was usually a Bishop, or some other Ecclesiastical Person, as a Dean or Archdeacon ; and sometimes the Great Seal was delivered to one of the King's Chaplains, in so much that the learned Glossographer tells us, there have been 160 clergymen advanced to the dignity ; and that until the 26th year of the reign of King Henry

the Eighth, all the Masters of the Rolls were Churchmen.

"The chief business of the Court of Chancery at that time was to mitigate the rigour of the Common Law, and clergymen were thought sufficiently qualified for that purpose, who gave relief according to their several opinions in cases where the law seemed to bear too hard upon the complainants; and because they formed their judgments by no settled or established rules therefore we have no reports of their decrees. But when the business of that Court increased and the Bishops could not attend the multiplicity of causes there depending, because of other necessary avocations for men of that order, then another set of men, bred up in the study and practice of the Common Law, were made Judges of this Honorable Court; and soon afterwards equity became artificial reason, and hath ever since such a mixture of law in it, that it would be much easier now for a lawyer to preach than for a prelate to be a Judge of that Court."

Conflict between the Chancery and Common Law Judges:

The very nature of the jurisdiction exercised by the Court of Chancery was such as would

strongly tend to produce friction between that Court and the Common Law Courts, whose doctrines and judgments were interfered with and overridden.

"We find that it was held in the Court of Chancery, in violation of the law established by legal decisions, that one executor and one joint tenant might in Chancery sue his companion; that, although from loss or other accident an obligee could not produce his bond, without which by a positive rule of law he could have no remedy, yet he might enforce the obligation in Chancery; that where the lessor entered on his tenant, and thus by the rule of law, suspended the rent, he could have relief in equity. So the Court of Chancery in certain cases gave relief against forfeiture which had been clearly incurred by the rules of law; the Court carrying its jurisdiction to the extent of ordering restitution after judgment at law and execution; the Court in these cases avoiding to transgress the provisions of the Statutes before adverted to, by not examining into the judgment itself, but prohibiting the party from putting it in force."

1 Spence 409.

The twentieth article of impeachment against Cardinal Woolsey ran as follows:—"Also the said

Lord Cardinal hath examined divers and many matters in Chancery after judgment thereof given at the Common Law, in subversion of your laws, and made some persons restore again to the other party condemned that, that they had in execution by virtue of the judgment at the Common Law;" and article twenty-six ran as follows:—"Also when matters have been near at judgment by process at your Common Law the same Lord Cardinal hath not only given and sent injunctions to the parties, but also sent for your judges, and expressly by threats commanding them to defer the judgment to the evident subversion of your laws if the judges would so have ceased."

4 Inst. 89.

The spirit in which this interference with the Common Law by writ of subpœna was received by the Common Law lawyers is shown in the following extract from a pamphlet written in the time of Henry VIII.:—"It is commonlie used nowe, so that the Common Law of the realme is taken for nothinge, but all the lawe that now is used is to determyne what is conscience and which is no conscience, and so the common lawe of the realme is nowe a-daies by you that be students turned all into conscience, and so ye make my Lord Chauncellor judge in everie matter and bring the lawes

of the realme in soche an uncertaintie that no man can be sure of any landes be it inheritance or purchase, but every mannes title shall be by this means brought in question into the Chauncerie; and therefore it shall be tried whether it be conscience or no conscience, and the lawe of the realme, by which we ought to be justified, nothing regarded."

Hargrave's Law Tracts, 331.

It is said in Bacon's Abridgement (Title "Court of Chancery") that "The jurisdiction of this Court was not only impugned towards its original creation, but even in the reign of Queen Elizabeth it was strongly holden by the judges of the Common Law Courts that the Chancellor could not by his decree sequester the party's lands, that is, could only *agere in personam* but not *in rem;* and agreeably hereto it was resolved 16 Elz. in the case of *Coleston* and *Gardner* that if a man killed a sequestrator in the execution of such process it was no murder."

Reeve in his history of English Law (cap. 24) tells us that "In the 22nd year of Edward IV., after a verdict, an injunction had been obtained, which hung up the cause for some time. Hussey, Chief Justice, asked the counsel for the plaintiff if

they would pray judgment according to the verdict; but they declared their apprehensions about infringing the injunction. To this one of the judges said, that though the injunction was against the plaintiff, yet his attorney might pray judgment with safety; and so *vice versa*. Hussey said that they had talked over the matter among themselves, and they saw no mischief which would ensue to the party, if he prayed judgment; for as to the penalty in the injunction, they were convinced *it was not leviable by law;* and then there remained nothing but imprisonment; as to that the chief justice said 'If the Chancellor commits any one to the Fleet, apply to us for a *habeas corpus* and upon the return of it we will discharge the party; and we will do everything to assist you.' It is true one of the justices said he would go to the Chancellor and ask him to dissolve the injunction, but this probably was suggested out of tenderness to the Chancellor's situation; for they agreed in declaring that they would give judgment if the party would pray it, notwithstanding the Chancellor continued the injunction."

In the year 1594 Mr. Sergeant Glanville was accused of contempt in having signed a replication in an action at law, after notice of an injunction against the defendant, his counsellors, attorneys

and solicitors, for staying the defendant's proceedings at law. He came before the Court and made his apology, stating that he was not aware of the injunction, "protesting further that he held so reverend an opinion of this Court, and knoweth that the injunctions thereof are so necessary for restraining or qualifying of the rigor or extremities of the Common Law, which by bad consciences are daily offered, as that the subjects are daily enforced to fly for succor and aid in equity unto this Court."

1 Spence 415, note *a*.

Lord Campbell, referring to this state of affairs, says:—"The attempts to prevent injunctions against fraudulent judgments in the Courts of Common Law originated from the jealousy of the Common Law Judges, and their regard for their own power and profit. The Statute 27 Ed. III. St. I. C. I. forbidding an application to other jurisdictions to impeach the execution of judgments in the King's Courts, which was unfairly resorted to in this dispute, had been passed merely with a view to prevent appeals to Rome. In the 31 Elizabeth there was an indictment on this Statute against a barrister for signing a bill filed in the Court of Chancery, praying an injunction against execution on a Common Law judgment, but it was

not brought to a trial, and a truce was established which was observed till the famous battle between Lord Coke and Lord Ellesmere."

Lives of the Lord Chrs., cap. 48.

"It is to be observed that all the judges were personally interested in preventing any interference with their jurisdiction, as they had fees in each cause that was tried."

1 Spence 674, note *e*.

Lord Campbell tells us that "For the sake of fees to the Chancellor and his officers, great encouragement was given to suitors resorting to Chancery."

Lives of Lord Chrs., Introduction.

Hallam gives the following account of the famous battle between Lord Coke and Lord Ellesmere referred to by Lord Campbell:—"The particular limits of this equitable jurisdiction were as yet exceedingly indefinite. The Chancellors were generally prone to extend them, and being at the same time ministers of state in a government of very arbitrary temper, regarded too little that course of precedent by which the other judges held themselves too strictly bound. The cases reckoned cognizable in Chancery grew silently more and more numerous; but with little overt opposition

from the Courts of Law till the time of Sir Edward Coke. That great master of the Common Law was inspired not only with the jealousy of this irregular and encroaching jurisdiction which most lawyers seem to have felt, but with a tenaciousness of his own dignity, and a personal enmity towards Egerton, who held the Great Seal. It happened that an action was tried before him, the precise circumstances of which do not appear, wherein the plaintiff lost the verdict, in consequence of one of his witnesses being artfully kept away. He had recourse to the Court of Chancery, filing a bill against the defendant to make him answer upon oath, which he refused to do, and was committed for contempt. Indictments were upon this preferred, at Coke's instigation, against the parties who filed the bill in Chancery, their counsel and solicitors, for suing in another Court after judgment obtained at law; which was alleged to be contrary to the Statute of praemunire. But the grand jury, though pressed, as it is said, by one of the judges, threw out these indictments. The King, already incensed with Coke, and stimulated by Bacon, thought this too great an insult upon his Chancellor to be passed over. He first directed Bacon and others to search for precedents of cases where relief had been given in Chancery after judgments

at law. They reported that there was a series of such precedents from the time of Henry VIII; and some where the Chancellor had entertained suits even after execution. The Attorney-General was directed to prosecute in the Star Chamber those who had preferred the indictments; and as Coke had not been ostensibly implicated in the business, the King contented himself with making an order in the Council book declaring the Chancellor not to have exceeded his jurisdiction.

1 Hallam Const. History, 339, 340.

A couple of the cases decided by the King's Bench in connection with this controversy are reported in Croke's Reports; one of them is reported as follows:—"In an action of debt at the Common Law, judgment being against the defendant, and day given to move in arrest thereof, he in the interim preferred his bill in Chancery and obtained an injunction to stay judgment and execution; but notwithstanding, the Court granted both; for by the Statutes of 27 Edw. 3, C. I., and 4 Hen. 4, cap. 23, after judgment given (be it in plea real or personal) the party ought to be quiet and to submit thereto; for a judgment being once given *in curia domini regis*, ought not to be reversed nor avoided but by error or attaint. And

in the same term upon a prohibition to stay proceedings in the Court of Requests, it was delivered for a general maxim in law, that if any Court of Equity doth intermeddle with any matters properly triable at the Common Law, or which concern freehold, they are to be prohibited; for neither writs of error nor attaint can be brought to reverse the decrees made in those Courts; otherwise it is upon trials at the Common Law; for all matters are there decided either by a jury of twelve men, against whom (if they err in their verdict) an attaint lieth; or by the Judges, where if they err in their judgment the party grieved may bring his writ of error."

Heath v. *Rydley*, Cro. Jac. 335.

The following is the report of the other of these cases:—

"Glanvil was committed to the Fleet the last day of Michaelmas Term, 11 Jac. 1, for not performing a decree in Chancery; and upon a *habeas corpus* returned, the case was informed to be thus:

Glanvil sold to Courtney, being a young gentleman, a jewel, which he pretended to be of the value of three hundred and sixty pounds, whereas in truth it was worth but twenty pounds, and three other jewels to the value of one hundred pounds;

and for his security he took a bond of six hundred pounds in the name of one Hampton and procured an action to be brought in the said Hampton's name and the action to be confessed, and Glanvil paid all the charges of both parties, and the confession was out of Court in the vacation.

Courtney finding this deceit, that the jewel was not worth above twenty pounds, which was delivered to him at the rate of three hundred and sixty pounds, exhibited his bill in Chancery for relief, and afterwards brought a writ of error to reverse this judgment; but the judgment was affirmed. Afterwards, upon a hearing in Chancery it was decreed that Glanvil should take again his jewel and one hundred pounds, and that he should procure Hampton to release and acknowledge satisfaction; and for not performing this decree he was imprisoned."

Courtney v. *Glanvil*, Cro. Jac. 343.

The report then goes on to give Chief Justice Coke's reasons for judgment, and ends with these words:—"Wherefore Coke and all the Court held here that the party ought to be bailed; and they let him to bail until the next term, and he was then discharged."

At the end of Cary's "Reports of Causes in Chancery" is set forth the order and decree made by King James I. "For a Rule to be observed by the Chancellor in that Court; exemplified and enrolled for a perpetual record there. *Anno*, 1616," reciting a letter written by the Chancellor by command of the King to Sir Francis Bacon, Attorney-General, requiring him and the rest of the King's Counsel to peruse precedents, from the time of Henry the Seventh, of complaints made in Chancery, there to be relieved according to equity and conscience after judgments in the Courts of the Common Laws, in cases wherein the Judges of the Common Law could not relieve them, and reciting the reports of the Attorney-General and Counsel in favor of the jurisdiction asserted by the Chancellor, and ordering that the said reports be confirmed and that the Chancellor do not desist from giving such relief to the King's subjects as shall stand with true merits and justice of their cases (notwithstanding any former proceedings at Common Law against them).

See Levinz Part 1, page 241, for an account of this reference to the King's Counsel; and see *Harris* v. *Colliton*, Hardres, 120; and *King* v. *Standish*, 1 Mod. 59, for a discussion of the subject.

Lord Coke's arguments upon the subject matter of this controversy will be found as stated by himself in 3 Institutes 123 *et seq.* and in 4 Institutes 84 *et seq.*, while Lord Ellesmere's position is stated by him in his judgment in the *Earl of Oxford's Case*, 2 White & Tudor, L. C. 642, and a review of the whole matter by Mr. Hargrave is given in a note in 2 Swanst 22.

Tutored and encouraged by the success of the Court of Chancery in this struggle, the Court of Exchequer, which also possessed an equity jurisdiction, sought to restrain suitors from proceeding in the Court of Chancery. Some account of this attempt will be found in the case of *Vendall* v. *Harvey*, decided in the reign of King Charles the First, from which it appears that on the same day in which the plaintiff's cause was to be heard by the Lord Chancellor his counsel was served with an injunction out of the Court of Exchequer, restraining the plaintiff from prosecuting his cause before the Lord Chancellor, and the Court being acquainted with this fact ordered the defendant to attend and asked him if he would waive his injunction and proceed in the cause, to which he answered that he desired counsel might be assigned to him, which was done accordingly and another day was

appointed for counsel to be heard on both sides, at which day the defendant insisted that it was not in his power to waive the injunction, whereupon the Court ordered the plaintiff's counsel to open the cause, which was done, and the defendant still insisting on his injunction, the Court decreed that they would not suffer it: "For as this Court (the report proceeds) doth not hinder the proceedings in the Exchequer, so that Court is not to obstruct the proceedings here by any injunction. Therefore the plaintiff shall be at liberty to proceed; and the defendant's counsel were enjoined by this Court not to move in the Exchequer, or to do anything to hinder the proceedings here, for which purpose the plaintiff may take an injunction. And as concerning the contempt of the defendant, and the punishment thereof, the Court advised further and ordered him to attend *de die in diem.*"

Nelson's Reports, 19.

In the year 1809 a somewhat similar contest arose in the State of New York between the Chancellor of that State and one of the Justices of the Supreme Court. The Chancellor committed one of the officers of the Court of Chancery to gaol there to remain until the further order of the Court, for that the said officer, while he was

Master, filed a bill to which he subscribed the name of one of the solicitors of the Court, without his knowledge or consent, and prosecuted the case in his name "contrary to the Statute in such case made and provided, in wilful violation of his duty as Master, and in contempt of the authority of the Court," and the committal was expressed to be "for his said malpractice and contempt."

One of the Justices of the Supreme Court discharged the Master on a *habeas corpus*, and the Chancellor recommitted him, and the said Justice discharged him again and the Chancellor committed him again. He was discharged upon the ground that the Court of Chancery had stated the conviction to be for a breach of an existing statute, and consequently for an indictable offence, and that the Court of Chancery had no criminal jurisdiction, and therefore no power to commit for the breach of a statute, and that the words "in contempt of the authority of the Court" did not enter into the essence of the offence and were merely words of aggravation.

After the Chancellor had committed the Master for the third time the Master was brought by *habeas corpus* before the full bench of the Supreme Court in Term, and the majority of that

Court concurred in the judgment of Chief Justice Kent, of that Court, that the Common Law Courts had no jurisdiction to interfere. The Chief Justice in his judgment refers to and comments upon the English decisions which grew out of the quarrel between Chief Justice Coke and Lord Chancellor Ellesmere, and says that the judgment of the King's Bench ought not to be cited as precedents as they are counteracted by the whole current of subsequent decisions.

Re Yates, 4 Johnson's Rep., 317.

See also *Yates* v. *Lansing*, 5 Johnson's Rep., 282, and 9 Johnson's Rep., 395.

"Sir Thomas More being informed that the Judges had expressed their disapprobation of the injunctions he had granted, caused a Docket to be made of every injunction, and the cause of it, which he had granted while he was Chancellor; and inviting all the Judges to dine with him in the Council Chamber at Westminster, he introduced the subject after dinner; when, upon full discussion of every one of them, the Judges confessed that he could have acted no otherwise. He then offered, that if the Judges of every Court, to whom it more especially belonged, from their office, to reform the rigor of the law, would, upon

reasonable consideration, by their discretion and, as he thought, they were in conscience bound, mitigate and temper the rigor of the law, no more injunctions should be granted by him. To this they would make no engagement; upon which he told them, that as they themselves forced him of necessity to issue injunctions to relieve the peoples injuries, they could no longer blame him. We are informed that afterwards, in a confidential conversation, he accounted for the backwardness of the Judges in the following manner: that they saw how by the verdict of a jury, they might transfer all difficulties and odium from themselves to the jurors, which they considered as their great defence and security; whereas the Chancellor was obliged to stand alone the assault of every malignant observation."

Reeve's History of English Law, cap. 30.

Salaries of the Judges:

I have already pointed out that the Judges of the various Courts were personally interested in swelling the volume of business in their respective Courts, as fees were payable to them in each of the cases brought before them.

It may be of interest for us to inquire into the amount of the salaries received by the Judges

from time to time, apart from any fees pertaining to their office. Sir William Dugdale deals with this question in chapter 40 of his *Origines Juridiciales*, from which we find that in the 11th year of the reign of Henry III. two of the justices of his courts had paid to them out of the Exchequer the annual sum of ten marks, and that in the 23rd year of the same reign one of the justices had paid to him the annual sum of £20, and that in the 27th year of the same reign, the Chief Baron of the Court of Exchequer received the annual sum of 40 marks, and that in the 28th year of the same reign, one of the Barons of that Court received the sum of 20 marks.

When we remember that a mark is two-thirds of a pound, we can easily understand that the judges needed to have their salaries supplemented by fees.

Dugdale traces the history of judicial salaries through various reigns until the reign of Henry VI. (in which reign the judges petitioned Parliament for an increase in their salaries) and says :— "So that after this they had (as it seemeth) an increase of their salaries ; and likewise an allowance in money for their robes ; for it appeareth that in 1 Edw. 4, John Markham, then Chief

Justice of the King's Bench, had a yearly pension of a CLXX marks granted unto him, and payable by the Clerk of the Hanaper; as also CVI s. XI d. farthing and sixth part of an half penny, for his Christmas Robe; and LXVI s. VI d. for his Robe at Whitsontide. * * * So likewise Sir Will. Huse, Knight, constituted Chief Justice of the same Court, 1 H. 7; had the yearly fee of CXL marks for his better support in that place granted to him, and CVI s. XI d. farthing and the sixth part of a half penny for his Winter Robe; as also LXVI s. VI d. for his Robe at Whitsontide. After this, viz., in 37 H. 8, there was a farther increase of their fees, viz., to the Chief Justice of the King's Bench and his successors for the time being of XXX l. *per annum;* to every other justice of that Court and their successors XX l. *per annum;* and to every justice of the Common Pleas and their successors XX l. *per annum.*"

Dugdale's *Origines Juridiciales* (3rd Ed.) 109-110.

The Chancellor appears to have fared better than the Common Law Judges in the matter of salary, for Madox tells us that "It is to be understood that for the dispatch both of the Royal Charters and of the Writs used in the proceedings

at law, the Chancellor had under him a competent number of clerks, employed in that service. And he had yearly an allowance from the Crown for his own and their maintenance. For example: King Henry III. in the 49th year of his reign, granted to Master Thomas de Cantelou, his Chancellor, D marks a year payable at the Exchequer at four times in the year, for the support of him and the clerks of the King's Chancery, so long as he should continue in that office. And in or about the 52nd year of the same King, Godfrey, Bishop of Worcester, the King's Chancellor, had D marks a year payable at the Exchequer, for the support of him and of the Clerks of the Chancery. In the 10th year of King Edward II., Adam, son of Robert and Thomas de Duston, poulterers, whom the Bishop of Winchester, the Chancellor, had sent into divers parts of the realm to buy poultry for the sustenance of the Chancellor and the Clerks of the Chancery, had the King's Letters Patent of Intendance and safe conduct."

1 Madox' History of the Exchequer, 75-6.

While the Chancellor thus had an advantage over the Common Law Judges in the way of official income, it appears that he was sometimes made to pay dearly for his office by way of fine to

the King. Thus Madox tells us that "In the reign of King Stephen, Geoffrey, the Chancellor, fined in three thousand and six pounds and a mark for the King's Seal," and Madox adds :— "This I understand to be a fine then lately made with the King for the office of Chancellor, or to have the keeping of the King's Seal. Which precedent may justly seem strange to us at this day. But it seemeth that in those times things of the like kind with this were sometimes done."

1 Madox' History of the Exchequer, 62.

Lord Campbell tells us, in a note to his Life of Sir Edward Coke, that in the reign of James I. the salary of the Chief Justice of the King's Bench was only £224 19*s.* 6*d.* a year with £33 6*s.* 8*d.* for his circuits, and the salary of the puisne Judges was only £188 6*s.* 8*d.* a year. At the same time the Chief Clerkship in the Court of King's Bench, which was a sinecure, and was in the gift of the Chief Justice, was worth £4,000 a year.

1 Lives of the Chief Justices, 286.

In the reign of Queen Ann, Lord Chancellor Somers introduced a Bill into the House of Lords and procured the enactment of a Statute to remedy some of the abuses which had grown up in connection with the administration of justice. Lord

Campbell referring to this Act says :—"The scandalous abuse had been established in England of creating sinecure offices in the Courts, payable by fees, some of such offices being grantable by the Crown, and some being grantable by the Judges. Nay, the judges themselves were chiefly remunerated by fees. It was thus utterly impossible that the suitors should not be sacrificed, and that the complaints of delay and expense with which Westminster Hall rang should not be well founded. The abolition of such offices, and the payment of the judges by fixed salaries, which we have seen accomplished, would not have been endured in that age."

Lives of the Lord Chancellors, cap. 110.

In connection with this question of salaries it is but proper that we should bear in mind that the purchasing value of gold and silver was very much greater in the Middle Ages than it is at the present day, and that the judicial salaries were not in reality quite so small as *prima facie* they appear to be. Dr. Adam Smith, writing upon this subject in 1776, says :—"It is not by the importation of gold and silver that the discovery of America has enriched England. By the abundance of the American mines those metals have

become cheaper. A service of plate can now be purchased for about a third part of the corn, or a third part of the labour, which it would have cost in the fifteenth century. With the same annual expense of labour and commodities, Europe can annually purchase about three times the quantity of plate which it could have purchased at that time. * * * The cheapness of gold and silver renders those metals rather less fit for the purposes of money than they were before. In order to make the same purchases, we must load ourselves with a greater quantity of them, and carry about a shilling in our pocket where a groat would have done before."

Wealth of Nations, Book IV, cap. 1.

Mr. John Stuart Mill, writing upon this subject, in the latter half of the present Century, suggests that the opening of new sources of supply of the precious metals in the Ural Mountains, California and Australia, might be the commencement of another period of decline upon which it was then useless to speculate.

Political Economy, Book III, cap. VII, sec. 2.

Whatever may be the causes thereof, it will not be hard to convince us who live in this age of

"Unions," "Leagues," "Combines," and "Trusts," that Adam Smith's ratio of one to three does not fairly represent the purchasing value of gold in these days as compared with its purchasing value in the Middle Ages.

Limits of Equity Jurisdiction:

For a long time, extending into centuries after the Chancellor began to exercise his extraordinary jurisdiction, there was much uncertainty and much discussion as to the extent and the limits of that jurisdiction. The early Chancellors were inclined to unduly stretch the limits of their authority, and to assert a right to grant relief in each particular case in accordance with what they, in their unfettered discretion, might deem to be natural justice.

Lord Chancellor Ellesmere gives expression to this view in his judgment in the *Earl of Oxford's case*, from which the following extracts are taken:—"The cause why there is a Chancery is, for that men's actions are so divers and infinite, that it is impossible to make any general law which may aptly meet with every particular act and not fail in some circumstances. The office of the Chancellor is to correct men's consciences for frauds, breaches of trust, wrongs and oppressions,

of what nature soever they be, and to soften and modify the extremity of the law, which is called *summum jus.* And for the judgment, etc., law and equity are distinct both in their Courts, their judges and the rules of justice; and yet they both aim at one and the same end, which is to do right; as justice and mercy differ in their effects and operations, yet both join in the manifestation of God's glory. * * * It has ever been the endeavor of all Parliaments to meet with the corrupt consciences of men as might be and to supply the defects of the law therein; and if this cause were exhibited to the Parliament, it would soon be ordered and determined by equity; *and the Lord Chancellor is by his place, under his Majesty, to supply that power until it may be had, in all matters of meum and tuum, between party and party.* * * *The Chancellor sits in Chancery according to an absolute and uncontrollable power*, and is to judge according to that which is alleged and proved; but the Judges of the Common Law are to judge according to a strict and ordinary (or limited) power."

2 W. & T. L. C. (6th Ed.) 645 *et seq.*

It is not strange that so extravagant a doctrine as this should meet, as it did meet, with the

strongest opposition from the Common Law lawyers and judges, and it is a doctrine which is no longer supported by even the warmest friends of the equitable jurisdiction.

This doctrine was logical enough when people believed in the divine right of kings, and when the royal prerogative was practically almost unbounded, and when it was supposed, or tolerated, that the king should have power, by his royal proclamation, in exercise of his prerogative, to override the laws of the land, so that the King, as the fountain of all justice, was supposed to possess the extraordinary power which the Chancellor claimed to exercise as the delegate of the King and the keeper of his conscience. The belief in the divine right of Kings, and in the unbounded extent of their prerogative, was banished from England along with the Stuart dynasty, and all pretence for any such extravagant jurisdiction as was asserted by the early Chancellors was banished at the same time.

Before the overthrow of this doctrine the learned Selden jestingly referred to it in his Table Talk (title Equity) as follows :—" Equity in law is the same that the spirit is in religion, what every one pleases to make it. Sometimes they go

according to conscience, sometimes according to law, sometimes according to the rule of Court. * * * Equity is a roguish thing; for law we have a measure and know what to trust to. Equity is according to the conscience of him that is Chancellor; and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure the Chancellor's foot. What an uncertain measure would this be? One Chancellor has a long foot, another a short foot; a third an indifferent foot. It is the same thing with the Chancellor's conscience."

As late as the year 1818 Lord Eldon deemed it necessary to repudiate the application of this taunt to his Court and he says:—"The doctrines of this Court ought to be as well settled, and made as uniform almost as those of the Common Law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this Court are to be changed with every succeeding Judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this Court varies like the Chancellor's foot."

Gee v. *Pritchard*, 2 Swanst. 414.

In a dialogue between a Sergeant-at-law and a student, written in the reign of Henry VIII., the Sergeant presents Selden's idea about the Chancellor's conscience in another form :—"And so me seemeth, that such a sute by a subpœna is not only against the law of the realme, but also against the law of reason. Also me seemeth that it is not conformable to the lawe of God. For the law of God is not contrary to itself, that is to say, one in one place, and contrary in another place, if it be well perceyved and understood as ye can tell Mr. Doctour; but this lawe is one in one Courte and contrarie in another Court; and so me seemeth, that it is not onlie againste the lawe of the realme, and againste the lawe of reason, but also againste the lawe of God. Also me seemeth, that this suite by a subpœna is against the common well of the realme. For the common well of every realme is to have a good lawe, so that the subjects of the realme may be justified by the same, and the more plaine and open that the lawe is, and the more knowledge and understanding that the subject hath of the lawe, the better it is for the common well of the realme; and the more uncertaine that the lawe is in any realme, the lesse and the worse it is for the common well of the realme. But if the subjects of

any realme shall be compelled to leave the lawe of the realme, and to be ordered by the discretion of one man, what thinge may be more unknowen or more uncertaine? But if this manner of suite by a subpœna be maintayned as you Mr. Student, would have it, in what uncertainte shall the King's subjects stande, when they shall be put from the lawe of the realme, and be compelled to be ordered by the discretion and conscience of one man? And namelie for as moch as conscience is a thinge of great uncertaintie; for some men thinke that if they treade upon two strawes that lye acrosse that they ofende in conscience, and some man thinketh that if he lake money and another hath too moche that he may take part of his with conscience; and so divers men divers conscience; for every man knoweth not what conscience is so well as you, Mr. Doctour; so me seemeth that if the King's subjects be constrayned to be ordered by the discretion and conscience of one man, they should be put to greate uncertaintie, that which is against the common well of a realme. And so me seemeth, it is not only against the Common Lawe but also against the lawe of reason, against the lawe of God, and against the common well of this realme."

Hargrave's Law Tracts, 325-6.

Blackstone refers to the assertion of this now exploded doctrine of unlimited authority and says: —"But this was in the infancy of our Courts of Equity, before their jurisdiction was settled, and when the Chancellors themselves, partly from their ignorance of law, (being frequently bishops or statesmen) partly from ambition and lust of power (encouraged by the arbitrary principles of the age they lived in) but principally from the narrow and unjust decisions of the courts of law, had arrogated to themselves such unlimited authority as hath totally been disclaimed by their successors for now (1765) above a century past. The decrees of a Court of Equity were then rather in the nature of awards formed on the sudden—*pro re nata*—with more probity of intention than knowledge of the subject; founded on no settled principles, as being never designed, and therefore never used for precedents."

3 Blk. Com., 433.

Judge Story says with reference to the same subject:—"If indeed a Court of Equity in England did possess the unbounded jurisdiction, which has been thus generally ascribed to it, of correcting, controlling, moderating and even superseding the law, and of enforcing all the rights as well as the charities, arising from the natural law and

justice, and of freeing itself from all regard to former rules and precedents, it would be the most gigantic in its sway and the most formidable instrument of arbitrary power that could well be devised. It would literally place the whole rights and property of the community under the arbitrary will of the Judge."

1 Story Eq., sec. 19.

Lord Campbell in the introduction to his Lives of the Lord Chancellors quotes Lord Camden's opinion of private and uncontrolled discretion as follows :—"The discretion of a Judge is the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worst it is every vice, folly and passion to which human nature is liable."

Lord Mansfield on the other hand more accurately defines judicial discretion :—"Discretion when applied to a Court of Justice means sound discretion guided by law. It must be governed by rule, not by humor. It must not be arbitrary, vague and fanciful, but legal and regular."

Rex. v. *Wilkes, 4 Bur. 2539.*

Mr. De Lolme defines the Courts of Equity in England as being "A kind of inferior experimental

legislature, continually employed in finding out and providing law remedies for those new species of cases for which neither the Courts of Common Law nor the Legislature have yet found it convenient or practicable to establish any; in doing which, they are to forbear to interfere with such cases as they find already in general provided for. A Judge of Equity is also to adhere in his decisions to the system of decrees formerly passed in his own Court, regular records of which are kept for that purpose. From this latter circumstance it again follows that a Judge of Equity, by the very exercise he makes of his power, is continually abridging the arbitrary part of it; as every new case he determines, every precedent he establishes, becomes a landmark or boundary, which both he and his successors in office are afterwards expected to regard."

De Lolme on the Constitution of England, Book I, cap. XI.

Some curious arguments were advanced in support of the contention that Courts of Equity should not be bound by precedent. The following argument upon this point is extracted from a pamphlet written in the reign of James I., entitled "The Abuses and Remedies of Chancery."

"Some Judges, when they seem doubtful what to determine in a cause, will be inquisitive after precedents; which I cannot conceive to what purpose it should be, unless that being desirous to pleasure a friend, and the matter being of that nature that they are ashamed to do it, they would faine know whether any before them have done so ill as they intend to do. For do they think that if any other have done the like, it is a sufficient warrant for them therefore? Surely noe! But every Judge taking upon him that weighty calling, ought to direct his orders *secundum allegata et probata*, and according to the rules of a good conscience, guided by the word of God, and upon certaine knowledge of the laws of the realm agreeable thereunto; and soe to divide between lawe and equity; that for the particular of any private person no violence be offered to the lawe; and not to be led like a bear by the nose after other men's examples, which, if it were admitted, there is no injustice, how gross and palpable soever, but might by this means easily be excused."

Hargrave's Law Tracts, 446.

"Perhaps the most general if not the most precise description of a Court of Equity in the English and American sense, is that it has juris-

diction in cases of rights, recognised and protected by the municipal jurisprudence, where a plain, adequate and complete remedy cannot be had in the Courts of Common Law. The remedy must be plain; for if it be doubtful and obscure at law, Equity will assert a jurisdiction. It must be adequate; for if it falls short of what the party is entitled to, that founds a jurisdiction in Equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief and secure the whole right of the party in a perfect manner at the present time and in future; otherwise Equity will interfere and give such relief and aid as the exigency of the particular case may require. The jurisdiction of a Court of Equity is therefore sometimes concurrent with the jurisdiction of a Court of Law; it is sometimes exclusive of it and it is sometimes auxiliary to it."

1 Story's Equity, sec. 33.

Instances of Equitable Interference:

We have now arrived at the stage when we can usefully consider some of the specific instances in which a Court of Equity would interfere with the rigor of the Common Law and administer the peculiar doctrines of equity by way of abating that

rigor. To deal fully with all such instances we should have to compile a treatise on Equity which would be outside the scope of these lectures and we shall therefore confine ourselves to a few examples selected for the purpose of illustration.

In the early days of the Court of Chancery such treatises as were written with regard to the equitable jurisdiction of that Court consisted of little else than statements of the particular instances in which the Court would grant relief, without laying down any general rules or principles for the guidance of suitors or practitioners. One of these productions written in the reign of Henry VIII., and entitled "A Little Treatise concerning Writs of Subpœna," is published by Mr. Hargrave among his "Law Tracts," and I shall extract therefrom one of the cases for equitable interference which are there given.

"There is a maxim in the lawe, that a rente, a common annuitie, and soche other things as lye not in manuel occupation, may not have commencement, ne be granted to none other without writing. And thereupon it followeth, that if a man for a certaine sume of money sell another forty pounds of rente yearly, to be percepted of his lands in D. &c., and the buyer thinking that the

bargaine is sufficient asketh none other and after he demandeth the rent, and it is denied him, in this case he hath no remedie at the Common Law for lacke of a deede ; and therefore in as moche as he that sold the rent hath—*quid pro quo*, the buyer shall be holpen by a subpœna. But if that graunte had bin made by his meere motion without any recompense ; then he to whom the rent was graunted shold neither have had remedie by the Common Lawe nor by subpœna. But if he that made the sale of the rent had gone farder, and saide that he before a certaine day wold make a sufficient graunte of the rente, and after refused to do it, there an action upon the case shold lye against him at the Common Lawe ; but if he made no such promise at the makinge of the contracte, then he that bought the rente, hath no remedie but by subpœna, as is saide before."

Hargrave's Law Tracts, 334.

Another instance in which a Court of Equity would grant relief upon grounds which might prove to be an insufficient defence at law, may be found in the case of *Thornborrow* v. *Whitacre*, reported in 2 Lord Raymond's Reports, 1164, which was an action at law brought by the plaintiff upon an agreement between himself and the defendant that

the latter in consideration of 2*s.* 6*d.* in hand paid and of £4 17*s.* 6*d.* to be paid upon the defendants performing the agreement, would deliver two grains of rye corn on Monday, the 29th of March, and four grains of rye corn on Monday next following, and eight grains of rye corn on Monday next after the Monday last mentioned, and sixteen grains of rye corn on Monday next after the third Monday, and double the number of grains of rye corn on Monday next after, being the fifth Monday, and so on for a year from the said 29th of March would on each successive Monday deliver to the plaintiff double as many grains of rye corn as he should have delivered upon the next preceding Monday. The defendant demurred to the plaintiff's declaration upon the ground that the agreement appeared upon the face of it to be impossible, as the rye to be delivered amounted to such a quantity that all the rye in the world was not so much, and that the contract being impossible was void and the defendant was not bound to perform it; but the Court overruled the demurrer and held that the defendant was bound to perform his contract or pay damages for breach thereof.

This is clearly a case in which a Court of Equity would have afforded relief to the defendant

upon the ground of fraud or imposition, or because unconscionable advantage had been taken of him.

See Story's Equity, note to sec. 1303.

Another defendant in a somewhat similar action at law was more fortunate than Whitacre. In this case the defendant bought a horse of the plaintiff and agreed to pay as the price of the horse a barleycorn a nail for each nail in the horse's shoes, doubling every nail, and there were thirty-two nails in all, and the plaintiff after doubling every nail and reckoning the entire amount claimed five hundred quarters of barley as the price of the horse. The Court directed the jury to give the plaintiff no more damages than the actual value of the horse and the jury assessed damages accordingly and this direction was subsequently upheld.

James v. *Morgan*, 1 Lev. 111.

This appears to be a case in which the Court wrestled with the law in an endeavor to do justice to the parties, but in equity the defendant would have been relieved as of course without wrenching any principles from their moorings.

Had the Common Law judges always shown the same earnest desire to do justice between man

and man which they exhibited in *James* v. *Morgan* the Court of Chancery, as a Court exercising equitable jurisdiction, would never have been called into existence.

Another familiar instance in which the doctrines of Equity would have afforded relief as of course is the case of Shylock's Bond.

A very amusing and at the same time instructive report of an appeal from the judgment of Portia in the action of *Shylock* v. *Antonio* is to be found in 5 Albany Law Journal, 193, where it is plainly shown that upon Common Law principles the judgment of Portia is wrong in almost every particular, and that the bond itself was void as being contrary to the policy of the law. But even though the bond had been perfectly good and valid, Equity would have afforded relief to the defendant upon the ground that the bond was given as security for the payment of money, and that in Equity the time named by such security for the payment of the money is never of the essence of the contract, and that payment of the amount secured, together with interest and costs, if any, will operate as a satisfaction of the bond if made or tendered at any time before final judgment in an action.

One of the doctrines of Equity which exercised a considerable influence in placing the Court of Chancery upon a firm footing is the doctrine of uses, an example of the application of which doctrine in its simplest form may be given thus :—A. being seised in fee of Whiteacre conveys the same to B. to the use of C.; Equity, apart from any statutory provision, looks upon C. as having the beneficial interest in the land, and looks upon B. as a trustee, whom C. can call to account for any rents and profits thereof which may have come to his hands.

"This notion," says Blackstone, "was transplanted into England from the civil law about the close of the reign of Edward III. by means of foreign ecclesiastics; who introduced it to evade the Statutes of Mortmain, by obtaining grants of lands not to their religious houses directly, but to—*the use of* the religious houses; which the clerical Chancellors of those times held to be *fidei-commissa* and binding in conscience, and therefore assumed the jurisdiction which Augustus had vested in his praetor, of compelling the execut on of such trusts in the Court of Chancery. And, as it was most easy to obtain such grants from dying persons, a maxim was established that though by law the lands themselves were not devisable, yet if

a testator had enfeoffed another to his own use, and so was possessed of the use only, such use was devisable by will."

2 Blk. Com. 328.

See Shep. Touchstone, 503-4.

The following account of the origin of uses is given in *The Doctor and Student* :—"When the general custom of property, whereby every man knew his own goods from his neighbors, was brought in among the people, it followeth of reason that such lands and goods as a man had ought not to be taken from him but by his assent, or by order of law ; and then sith it be so, that every man that hath lands hath hereby two things in him, that is to say, the possession of the land, which after the law of England is called the frank tenement, or the freehold, and the other is authority to take thereby the profits of the land ; wherefore it followeth that he that hath land, and intendeth to give only the possession and freehold thereof to another, and keep the profits to himself, ought in reason and conscience to have the profits, seeing there is no law made to prohibit, but that in conscience such reservation may be made. And so when a man maketh a feoffment to another, and intendeth that he himself shall take the profits ; then the feoffee is said seised to his use that so enfeoffed

him, that is to say, to the use that he shall have the possession and freehold thereof, as in the law, to the intent that the feoffor shall take the profit."

Doctor and Student, cap. 22.

See 1 Rep. 121 *a*, *et seq.*

The adoption by the Court of Chancery of the doctrine of uses was strongly opposed by the Common Law lawyers, and I cannot better give the grounds of their opposition than by quoting from a tract written in answer to certain statements contained in the "Doctor and Student," and entitled "A Replication of a Serjaunte at the Lawes of England, to certayne pointes alleged by a student of the said lawes of England in a Dialogue in Englishe between a Doctor of Divinity and the said Student." The tract appears to have been written shortly after the first publication of the "Doctor and Student," in 1523.

The Sergeant is made to express himself as follows, with regard to the origin of uses :—"I say under correction and reformation of my lordes and maisters the judges of the lawe of this realme, that they began of an untrue and crafte invention to put the Kinge and his subjects from that which they ought to have of righte by the good true Common Lawe of the realme; as the King's highness from

his escheats, his wardes and his primer seasins, and from other things that now come not to my mynde; and his subjects from their escheats and wardes, women from their dowers, and the husbandes of such women that be inheritoures from their tenures by the curtesie of England, the which they ought to have by the lawes of the realme; and those that have good right and tytle to any land to recover it by action after the course of the Common Lawe be put from their actions, and if they bringe their actions to cause soche delaies that they shall never have recoverie. * * By soche uses the good Commnon Lawe of the realme, to which the King's subjects be inherite, is subverted, and made as voyde, so that none of the saide subjects can be and stand in anie surety of any possession. For if he claime and proove his tytle by a deed of feoffment, the other partie will say he was but a feoffee of truste; and if he claime by a fyne or by a recovery, he will say likewise, that he was of trust; so that neither deede, ne fyne, ne yet recoverye, which make men's titles by the Common Lawe, maketh or enforceth any maun's title at this daye; and all because of this false and craftie invention of uses as I thinke: To proove that it beganne upon an untruth and false purpose, it appeareth by that, that he, which maketh

soche a feoffment saithe and doth one thing and thinketh another thinge cleane contrarie. For he sayeth by his worde and by his deede and writings, and liverie and seasin, that the feoffee shall have the land to him and to his heirs; and his mynde and entent is, that he shall not have it, but he will have it himselfe. What a falsenes is this to speake and do one thinge, and thincke another thinge cleane contrarie to the same! Every man may perceive, in my mind, that of this can come no goodness, but crafte and falsehood. And so me seemeth, that these uses began by an untruthe and craftie invention, and are continued by an untruthe, and for a deceite; and yet do ye that be students of the Common Lawe of the realme, maintaine this untrue and crafty invention in the Chauncery by the colour of conscience, contrarie to the studie and learning of the Common Lawe, and contrary to reason, and also to the lawe of God. What reason is it, that if I give you my land, with all the circumstances that belong to a guifte of land by the lawe, or levie a fyne or suffer a recovery against me, and yet I to have the disposition of the land myselfe! So that it appeareth in my mynde, that these uses began by an untrue and craftie invention and is maintained in the Chauncerie by the colour of conscience to the subversion

of the good Common Lawe of this realme, againste all reason, and contrarie to the lawe of God, which teacheth nothinge but truth, not only to the express wronge and hurte of the King's highness and of all his subjects, but also as moche as in them is to bringe the King's hignes to the detestible offence of perjurie."

Hargrave's Law Tracts, 328-9.

The feeling against uses became so strong that Parliament determined to abolish uses, in so far as they related to lands, tenements and hereditaments, and in the 27th year of the reign of Henry VIII. the Statute of Uses was passed, (cap. 10) whereby it was enacted that if any person shall stand seized of any lands, tenements or hereditaments to the use of another, the person that has such use shall stand seized of such lands, tenements or hereditaments for the same estate therein that he has in such use.

The effect of this Statute was to convert every use of lands into a legal estate in the lands, and to thereby bring the same within the jurisdiction of the Common Law Courts and save the necessity for any resort to the Court of Chancery.

Twenty-two years after the passing of this Statute (Mich. Term 4 & 5 Ph. & M.) the judges

by a decision practically rendered the Statute nugatory by holding that the Statute will not execute more than one use, and that if there be a second use declared the Statute will not operate upon it. The effect of this was to bring again into full operation the equitable doctrine as to uses in lands.

The case in question was one in which there was a *Bargain and Sale* for a valuable consideration to A. *habendum* to the use of the bargainor for life, remainder to the use of A. in tail, remainder to the right heirs of the bargainor. It was held that the *habendum* was void and that A. had the land in fee "because an use cannot be ingendered of an use," and because the operation of the Statute was in this case exhausted upon the use which was raised upon the bargain and sale, and the Statute therefore did not operate upon the use mentioned in the *habendum*.

Tyrrell's Case, Dyer 115 *a*.

Lord Chancellor Hardwicke gives the following account of the effect which this Statute had upon uses :—"Before the Statute of Hen. 8, the judges of the Common Law gave uses very hard names, and called them the product of fraud, etc. To remedy those mischiefs the Statute was made,

to execute and bring the estate to the use, that after the Statute the *cestui que use* was seised of the estate at law as before he was of the use in equity; and this the judges professed to adhere to, but notwithstanding that, the necessities of mankind, and reasonable occasions in families obliged them in a little while to give way to uses. Contingent uses, springing uses, executory devises, powers over uses, were also foreign to the notions of the Common Law, and could not be limited on Common Law fees, but were let in by construction, by the judges themselves, upon uses, after they became legal estates; yet the judges still adhered to the doctrine that there could be no such thing as an use upon an use, but where the first use was declared, there it was executed and must rest for that estate; therefore, on a limitation to A. and his heirs, to the use of B. and his heirs in trust for D., B.'s estate was held then to be executed by the Statute and D. took nothing. Of this construction equity took hold and said that the intention was to be supported. It is plain B. was not intended to take, his conscience was affected. To this the reason of mankind assented and it has stood on this foot ever since, and by this means a Statute made upon great consideration, introduced in a solemn and pompous manner, by this strict

construction, has had no other effect than to add at most three words to a conveyance."

Hopkins v. *Hopkins*, 1 Atk. 591.

Undue Interference of Equity:

While it must be conceded that in the great majority of instances where Equity intervened to modify the rigor of the law, such intervention was beneficial in its results, yet it seems to be equally clear on the other hand that the Court of Chancery has exhibited too great a fondness for interfering with the freedom of contract between parties acting at arms length, and deliberately assuming obligations which the paternal Court of the Chancellor afterwards tells them they need not perform. A striking illustration of these remarks is to be found in the case of money bonds. A. enters into a bond with B. whereby A. binds himself to pay B. $1,000 on a day certain, with a condition that the bond shall be void on payment of $500 at any time previous to the day named.

At Common Law A. would be bound to do what he agreed to do, and if he failed to pay the $500 before the day named he would be bound to afterwards pay the full sum of $1,000, but Equity would interfere in such a case and tell A. and B. that A. did not mean what he said in his covenant,

and that he only meant that he would pay the $500 on the day named and that he would pay interest thereon from that time, if he made default in payment of the principal money.

Lord Bramwell (then Baron Bramwell), referring to this question, says :—" Look for a moment at the history of these bonds. Originally the penal sum mentioned in them was recoverable. The Courts of Equity, unfortunately as I think, established a practice of relieving the obligor from payment of the penalty, of relieving him, that is to say, from the obligation of doing what he had contracted to do.

Preston v. *Dania*, L. R. 8 Ex. 20-21.

This condemnation will apply to the greater portion of the rules of Equity relating to penalties and forfeitures.

The disposition of the Court in this class of cases has been to make for suitors such judicially constructed contracts as the Judges deemed that prudent men should have made, rather than to interpret and enforce the contracts in question as they actually found them.

The modern judicial tendency, however, is against any such interference with the freedom of

contract, and one of the greatest of the modern exponents of Equity has expressed himself upon the point as follows:—"I have always thought and still think that it is of the utmost importance as regards contracts between adults—persons not under disability and at arms length—that the Courts of Law should maintain the performance of the contracts according to the intention of the parties; that they should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves."

Per Jessel, M.R., in *Wallis* v. *Smith*, 21 Chy. D. 266; and see *Printing, etc., Co* v. *Sampson*, L. R. 19 Eq. 465.

In the same case Cotton, L.J., says:—"I must say that I quite agree with the Master of the Rolls that the sounder view to take is this, to leave people who are competent and under no disability to make their own contracts and then to act on these contracts whatever the true interpretation might be, without assuming on behalf of the Courts, either of Law or Equity, to say 'This is unreasonable and we will make another and different contract between the parties. They did not mean what they have said in their contracts.'"

The Court of Chancery rendered necessary by the Conservatism of the Common Law Judges:

We have now seen enough of the history of the Court of Chancery to make us aware that the existence and continuation of that Court was rendered necessary by the technicality of the Common Law Judges, by their strict adherence to form and precedent, by their inclination to follow what they understood to be the strict letter of the law, no matter how absurd or unjust the result might be, by their unwillingness to mould the doctrines and practice of the Common Law, to meet the exigencies of the times and their unwillingness to afford new forms of legal relief in cases and combinations of circumstances which had not been foreseen and provided for by the early fathers of the Common Law, and by their refusal to even avail themselves of legislative enactments passed for the purpose of so moulding their doctrines and practice as to enable them to do complete justice, without resort being had to the Court of Chancery.

Hallam says that the extension of the equitable jurisdiction of the Court of Chancery was chiefly owing "to a strange narrowness and scrupulosity of the Judges, who, fearful of quitting the letter of their precedents even with the

clearest analogies to guide them, repelled so many just suits, and set up rules of so much hardship, that men were thankful to embrace the relief held out by a tribunal acting in a more rational spirit. This error the common lawyers began to discover in time to resume a great part of their jurisdiction in matters of contract, which would otherwise have escaped them. They made too an apparently successful effort to recover their exclusive authority over real property, by obtaining a Statute for turning uses into possession; that is, for annihilating the fictitious estate of the feoffee to uses and vesting the legal as well as equitable possession in the *cestui que use*. But this victory if I may use such an expression, (since it would have freed them, in a most important point, from the Chancellor's control) they threw away by one of those timid and narrow constructions which had already turned so much to their prejudice; and they permitted trust-estates, by the introduction of a few more words into a conveyance, to maintain their ground, contra distinguished from the legal seisin, under the protection and guarantee, as before, of the Courts of Equity."

Hallam's Const. Hist. England, cap. 6.

Lord Hobart is reported to have said:—"I do exceedingly commend the Judges that are curious

and almost subtle, *astuti* (which is the word used in the proverbs of Solomon in a good sense when it is to a good end) to invent reasons and means to make acts according to the just intent of the parties and to avoid wrong and injury which by rigid rules might be wrought out of the act."

Hobart, 277.

If the Common Law Judges had acted in this spirit there would have been no need for the Court of Chancery to exercise its extraordinary jurisdiction.

Mr. Pomeroy says with regard to the different methods of development of the Roman law and English law respectively:—"There are certainly many striking analogies between the growth of Equity in the Roman and English law; the same methods were up to a certain point pursued, and in principle the same results were reached. The differences however are no less remarkable. No separate tribunal or department was made necessary in the Roman jurisprudence, because the ordinary magistrates were willing to do what the early English Common Law Judges utterly refused to perform—that is, to promote and control the entire legal development as the needs of an advancing civilization demanded. While these Common Law Judges resisted every innovation

upon their established forms, and shut up every way for the legal growth the Roman magistrates were the leaders in the work of reform, and constantly anticipated the wants of the community. The English Judges made a new Court and a separate department indispensible; the Roman prætors accomplished every reform by means of their own jurisdiction, and preserved in the jurisprudence a unity and homogeneity which the English and American law lacks, and which it can, perhaps, never acquire."

Pomeroy's Equity, sec. 9.

The same author, dealing with the same subject, says:—"The prætors constantly invented new actions and defences, which preserved, however, a resemblance to the old; and at length they boldly freed the jurisprudence from the restraints of the ancient methods, and introduced the notion of *aequitas* by which the whole body of judicial legislation became in time reconstructed. All the process of development was completed without any violent or sudden change in the judicial institutions and the Roman law thus preserved its unity and continuity. The English Common Law Judges, on the other hand, set themselves with an iron determination against any modification of the doctrines and rules once established by precedent, any relax-

ation of the settled methods which made the rights of suitors to depend upon the strictest observances of the most arbitrary and technical forms, any introduction of new principles which should bring the law as a whole into a complete harmony with justice and equity."

Pomeroy's Equity, sec. 17.

Legal Doctrines Modified by Equity Doctrines.

We have already seen something of the struggle for jurisdiction which took place between the Common Law Courts and the Court of Chancery in the early days of the latter Court, and it is now in order to point out that during the course of this struggle the Common Law Judges from time to time modified several of the doctrines of their Courts, so as to enable them to more effectually cope with their aggressive opponents in the Chancery. While they were not willing to adopt such modifications as would do away with the necessity for the extraordinary jurisdiction of the Chancellor, they did from time to time remould their doctrines sufficiently to prevent their halls becoming deserted.

Mr. Spence gives the following account of one of the most important of these modifications:—

"The jurisdiction of the Court of Chancery appears to have been anciently called into action in respect of executory promises and implied obligations now designated under the name of *assumpsits*, by reason of the Courts of Law not having at first acted upon the Statute of Westminster 2, so as to give a remedy by the action on the case, in cases intended to be embraced within its provisions; a breach of promise of marriage was one of the cases for which no remedy could then be obtained at law. It appears that in the time of Edward IV. many suits founded on equitable assumpsits were still instituted. Fairfax, who is described as a very learned judge of this reign, urged that the action on the case should be attended to, and the jurisdiction of the Common Law Courts maintained, for that subpœnas would not then be so frequently resorted to. His advice appears to have been followed and the action on the case was * * greatly extended. The Court of King's Bench, after it had assumed jurisdiction in these cases, endeavored * * * to establish a right to enjoin a party from applying to the Court of Chancery in cases which, in the judgment of that Court were properly the subject of an action on the case; and where an injunction was obtained in such a case in the Court of Chancery, which was dissolved, the

Court of King's Bench, of their own authority, gave compensation to the plaintiff for the delay, over and above the damages given by the jury. But there were some cases in which it was admitted that it was still necessary for the Court of Chancery to interfere by reason that the Courts of Law could not give a remedy by action on the case; even down to the reign of Charles I., where the surety had paid the debt, and he had no counter security from the debtor, it seems the Court of Chancery was the proper Court to compel the debtor to reimburse the surety."

1 Spence 694-5 and see 243.

For full History of Assumpsit and Trespass on the case, see Hare on Contracts, Cap. VII. and VIII., and see 2 Harvard Law Rev., pages 1 and 53.

Another action borrowed or invented by the Common Law Judges for the purpose of attracting business to their Courts is the action for money had and received, of which Blackstone gives the following account:—"A third species of implied *assumpsit* is when one has had and received money belonging to another without any valuable consideration given on the receiver's part; for the law construes this to be money had and received for the use of the owner only; and implies that the person so re-

ceiving promised and undertook to account for it to the true proprietor. And if he unjustly detains it, an action on the case lies against him for the breach of such implied promise and undertaking; and he will be made to repair the owner in damages equivalent to what he has detained in violation of such his promise. This is a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which *ex aequo et bono* he ought to refund. It lies for money paid by mistake or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where any undue advantage has been taken of the plaintiff's situation."

3 Blk. Com. 162. The whole of the modern law upon this subject will be found in the notes to *Marriott* v. *Hampton*, 2 Smith's L. C.

Another doctrine borrowed or invented by the Common Law Judges, for a purpose similar to that last referred to, is the doctrine of estoppel. Vice-Chancellor Bacon speaks of the doctrine as follows: "The Common Law doctrine of estoppel was * * * a device which the Common Law Courts resorted to at a very early period to strengthen and lengthen their arm, and not venturing to exercise an equitable jurisdiction over the subject before

them, they did convert their own special pleading tactics into an instrument by which they could obtain an end which the Court of Chancery without any foreign assistance did at all times, and I hope will at all times put into force in order to do justice. But the doctrine of estoppel is purely legal."

Keate v. *Phillips*, 18 Chy. D. at 577.

Chief Justice Harrison on the other hand says as to the origin of the doctrine:—"The real ground upon which a person is precluded from proving that his representation on which another acted to his prejudice is false, is that to permit it would be inequitable. This is the reason that estoppel *in pais* is sometimes described as an equitable estoppel. The jurisdiction of enforcing this equity originally belonged to Courts in Equity; and does not appear to have been familiarly recognized at law until within a comparatively recent date."

McArthur v. *Eagleson*, 43 U.C.R. 416.

Mr. Justice Buller tells us that "The law-merchant is a system of equity, founded on the rules of equity, and governed in all its parts by plain justice and good faith."

Master v. *Miller*, 4, T.R. at 342.

In another case Ashhurst, J., says:—"It is true that formerly the Courts of Law did not take

notice of an equity or a trust; for trusts are within the original jurisdiction of a Court of Equity; but of late years it has been found productive of great expense to send the parties to the other side of the Hall; wherever this Court have seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then if this Court will take notice of a trust why should they not of an equity."

Winch v. *Keeley*, 1 T. R., at p. 622-3.

The language of this extract from a judgment pronounced in 1787 is rather more than three quarters of a century in advance of its time, but there can be no doubt that the existence of such sentiments in the minds of various Common Law Judges had much to do in modifying the rigour of the Common Law.

Law and Equity are Both Progressive:—

Sir Henry Maine, speaking of the progressive societies, says:—"With respect to them it may be laid down that social necessities and social opinion are always more or less in advance of law. We may come indefinitely near to the closing of the gaps between them but it has a perpetual tendency to re-open. Law is stable; the societies we are speaking of are progressive. The greater or less

happiness of a people depends on the degree of promptitude with which the gulf is narrowed."

Maine's Ancient Law, cap. 2.

Sir Henry Maine then goes on to point out that the instrumentalities by which law is brought into harmony with Society are three in number, namely, Legal Fictions, Equity and Legislation, and that historically they operate in the order given. "The Equity whether of the Roman Prætors or the English Chancellors, differs from the Fictions which in each case preceded it, in that the interference with law is open and avowed. On the other hand, it differs from Legislation, the agent of legal improvement which comes after it, in that its claim to authority is grounded not on the prerogative of any external person or body, not even on that of the magistrate who enunciates it, but on the special nature of its principles to which it is alleged that all law ought to conform. The very conception of a set of principles, invested with a higher sacredness than those of the original law and demanding application independently of the consent of any external body, belongs to a much more advanced stage of thought than that to which legal fictions originally suggested themselves."

Maine's Ancient Law, cap. 2.

Mr. Spence quotes from Professor Millar as saying :—" Law and Equity are in continual progression, and the former is constantly gaining ground upon the latter. Every new and extraordinary interposition is by length of time converted into an old rule. A great part of what is now strict law, was formerly considered as Equity ; and the equitable decisions of this age will unavoidably be ranked under the strict law of the next."

1 Spence, 322, note *a*.

Sir George Jessel, M.R., refers to the modern rules of Equity and adds :—" I intentionally say modern rules, because it must not be forgotten that the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented. Take such things as these ; the separate estate of a married woman, the restraint on alienation, the modern rule against perpetuities and the rules of equitable waste. We can name the Chancellors who first invented them, and state the date when they were first introduced into Equity juris-

prudence; and therefore, in cases of this kind the older precedents in Equity are of very little value. The doctrines are progressive, refined and improved; and if we want to know what the rules of Equity are, we must look of course rather to the more modern than the more ancient cases."

Re Hallett's Estate, 13 Chy. D. 710.

Law and Equity Merged in One System:–

The three instrumentalities named by Sir Henry Maine have worked their effect upon the English Common Law. In the first place the Common Law was to a very considerable extent modified and moulded by legal Fictions, but this pertains rather to the history of the Common Law than to the history of Equity. We have seen how in the next place it was affected by the doctrines of Equity; and the last of the three instrumentalities, namely, legislation in the shape of the Judicature Act has declared that both Law and Equity shall be administered in the same forum, and that in all matters "In which there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same matter, the Rules of Equity shall prevail."

KEHOE'S CHOSES IN ACTION. An exposition of the Law relating to the assignment and Transfer of Securities, with the practice thereunder. By J. J. Kehoe. Cloth, $2; 1881, Half-calf, $2.50.

LEGGO'S FORMS AND PRECEDENTS of Pleadings in the Court of Chancery Second edition. By W. Leggo, 1876. Half-calf, $5.

LEWIS' (E. N.) INDEX TO ONTARIO STATUTES. An Alphabetical Index to Ontario Statutes, down to and including the year 1884, including the Revised Statutes of Ontario down to and including 1884, 1884. Cloth, $2.50; Half-calf or sheep, $3.

LEWIS' JUSTICES MANUAL. Containing a short Summary of the usual practice and manner of procedure in ordinary cases, coming under the observation of Justices of the Peace, Coroners, Constables, Landlords, Bailiffs, etc. By E. N. Lewis. Cloth, $1.50; Half-calf, $2.

LEWIS (E. N.) ON SHIPPING. A Treatise on the Law of Shipping respecting Inland and Sea coast Shipping of Canada and the United States. 1885. Half-calf or Sheep, $5.

LOWER CANADA JURIST. A collection of Decisions, 1857-1875. 20 vols. Half-calf, $100. N.B.—This Series is continued to date.

LOWER CANADA LAW JOURNAL and Magazine of Jurisprudence, containing cases not elsewhere reported. 1866-8, 4 vols. Half-calf, $10.

MACLENNAN'S (JAS., Q.C.) JUDICATURE ACT 1881, and subsequent Rules of the Supreme Court of Judicature and the High Court of Justice, with the orders of the Court of Appeal. Second edition. By Thos. Langton, M.A., LL.B. Half-calf, $5.

MANITOBA REPORTS. (Temp. Wood). A collection of Decisions in the Court of Q. B. of Manitoba, in the time of Chief Justice Wood. Half-calf, $10.

MARITIME COURT RULES. The General Rules of the Maritime Court of Ontario to date with Forms, Tariff of Costs and Fees. 1878. $1.

CARSWELL & CO., LAW PUBLISHERS, Etc.,

26 & 28 Adelaide Street East, Toronto.

NEW BRUNSWICK REPORTS. Reports of Cases determined by the Supreme Court of N. B. Subscription in advance $6. Half-calf $7 per vol. as follows :—

N. B. R. vol. 2 (Berton.)
" " " " 10 & 11 (Allen vols. 5 & 6.)
" " " " 12 & 13 (Hannay 2 vols.)
" " " " 14, 15 & 16 (Pugsley 3 vols.)
" " " " 17 to 20 (Pugsley and Burbidge 4 vols.)
" " " " 21-24.

NOVA SCOTIA REPORTS. Subscription $5 per vol.

N. S. R. vol. 2 (James.)
N. S. R. " 19, 20 (Russell and Geldert 7, 8.)

O'SULLIVAN'S CONVEYANCER. A Manual of Practical Conveyancing, with Forms, Precedents and References. By D. A. O'Sullivan, LL.B. 1882. Half-calf, $4.

O'SULLIVAN'S (D. A., LL.B.) HOW TO DRAW A SIMPLE WILL. 1883. Paper, $1.

O'SULLIVAN'S (D. A., M.A., D.C.L.) MANUAL OF GOVERNMENT. A Manual of Government in Canada; or the principles and institutions of our Federal Constitutions. 2nd edition, 1887. Cloth, $3.25; Half-calf, $4.

ROGERS' (R. VASHON, Jr.) LAW AND MEDICAL MEN. A Treatise on the law relating to Physicians, Dentists and Druggists. 1884. Cloth, $1.50; Half-calf, $2.

ROGERS' (R. VASHON, Jr.) LAW OF THE ROAD; or the Wrongs and Rights of a Traveller. 1881. Cloth, $1 50; Half-calf, $2.

SPLINTERS. A collection of humorous anecdotes from various sources. Cloth, $1.50.

STEPHENS' (C. H.) JOINT STOCK COMPANIES. A practical exposition of the law of Joint Stock Associations, including the Canada Clauses Act, 1877, and the Acts of Ontario and Quebec. 1881. Half-calf, $7.

STEVENS (J. G., Judge), on Indictable Offences and Summary Convictions. 1880. Cloth, $1.50. Half-calf, $2.00.

STEVENS' (J. G., Judge) DIGEST of the reported and unreported cases of the Supreme Court of New Brunswick from 1825-1879. Second Edition. Half-calf, $13.00.

STEVENS', DITTO, from 1880-1887. 1888. Half-calf, $5.00.

TACHE'S (Louis H.) LEGAL HAND BOOK AND LAW LIST for the Dominion of Canada and a Book of Parliamentary and General Information. 1888. Cloth, $3.00.

CARSWELL & CO., LAW PUBLISHERS, Etc.,

26 & 28 Adelaide Street East, Toronto.

TASCHEREAU'S (Hon. Mr. Justice) CRIMINAL LAW. Consolidation and Amendment Acts in force on 1st day of March, 1887. 2nd Edition. 1888. Half-calf or circuit, $10.00.

TAYLOR'S EQUITY JURISPRUDENCE. A Commentary on Equity Jurisprudence, founded o... M.A., Q.C. 1875. Half-calf, $5...

TAYLOR... of the Public Statutes relati... and Resolutions of the Gener... lleges and schemes of the Churc... Cloth, 75c.

TIFFAN... stry Offices—Registrars —Boo... Registration—Manner of Regis... er—Fees—Forms, etc. 1881. Half-...

TODD'S ... ernment in British Colonies. By Alphe... .00.

TRAVIS'... itise on the Constitutional Powers of Pa... er the British North America Act. 1884.

WATSON... NTS. By S. J. Watson, late Libra... $1.00.

UPPER ... /s: Taylo... vols.; Q. B., 25 vols.; C. P.,... ls.; Error and Appeal, 3 vols.

WALKE... elating to the Execution and R... 3. Half-calf, $5.00.

YOUNG'S VICE-A... of Sir Wm. Young, Kt., LL.B., Judge of the Court of Vice-Admiralty for the Province of Nova Scotia. 1865-1880. Edited by J. M. Oxley. Half-calf, $6.00.

The above named books are published and owned by us, and will be sent to any address, carriage prepaid, on receipt of the price.

CARSWELL & CO., LAW PUBLISHERS, Etc.,

26 & 28 Adelaide Street East, Toronto.